

ARGUMENTS

OF

EDGAR T. BRACKETT

Of Counsel for the Managers for the Assembly

ON THE

Impeachment Trial of William Sulzer

AT THE CAPITOL, IN THE CITY OF ALBANY

1913

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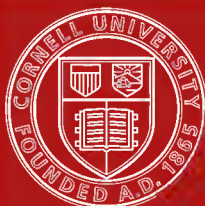
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Albany

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Argument for the Managers, made September 22, 1913, on the question whether the Assembly had the power to impeach at the extraordinary session called by the Governor.

Mr. Brackett.— With the permission of the Court: My associates have thought that I should suggest some additional points that have come under my preparation. We are keeping ourselves very well within the time which counsel on the other side have consumed.

The President.— Very well; you will have full opportunity to address the Court.

Mr. Brackett.— With the permission of the Court: The defendant stands properly impeached by the Assembly. There is no limitation in the Constitution as to the exercise of this power of impeachment, nor is there any direction of procedure in such cases. It is urged that impeachment may not be had at an extraordinary session of the Legislature. There are at least two complete answers to this contention. In the first place, these articles of impeachment were not adopted at an extraordinary session or any session of the Legislature. They were adopted at a meeting of the Assembly that happened to be held during a time when there was an extraordinary session of the Legislature, as it could have been held at any time, whether the Legislature was in session or not. Second, the Assembly may adopt impeachment proceedings at an extraordinary session of the Legislature. There is no limitation in the Constitution against it doing so. Under the Constitution (I now quote):

“The legislative powers of the State shall be vested in the Senate and Assembly.”

I call your attention to the fact that the *legislative* powers of the State are vested in the Senate and Assembly; and the Legislature is directed to assemble on the first Wednesday in January of each year. In addition to this, the regular session, when both houses are required to come together, without notice or call of

any kind, the Governor "shall have power to convene the Legislature or the Senate only on extraordinary occasions. At extraordinary sessions no subject shall be acted upon except such as the Governor may recommend for consideration."

There is no authority anywhere for the Governor to convene the Assembly alone, and it stands here, if the Presiding Judge and members of the Court please, that, upon the contention of the learned counsel for the defendant, there is absolutely no time on earth when there can be any impeachment at any moment during the year. The Legislature being in session does not mean that the Assembly is in session, as a separate body. It is here as a constituent part of the Legislature, and if the contention is true that the counsel for the defendant here presses, although there is conferred in the most general terms the power of impeachment, broad as the encasing air, there is no time that it can be exercised, because there is no way in the wide world under the shining sun, that the Assembly can get itself together. But, on the present occasion we need not be much troubled with the question as to how the Assembly may convene for the purpose of impeachment. It did get together. The members were together. While it is conceivable that a Governor may be of so high a mind and so conscious of his own rectitude and so sure of his position, and so certain that he has done nothing worthy of impeachment or criticism, that he may issue a call convening the Assembly and recommend the consideration of the subject of his own impeachment, and then join battle in an orderly way as to whether he is guilty of anything impeachable, perhaps that is too much to require, or hope for, from one of our poor humanity, perhaps too much to expect that the average man or the average Governor would do so. It is rather, probably, to be expected that he distinctly will not do so, but will shield himself behind what is a technicality, that he cannot be impeached in the manner and at the time that the proceedings were instituted, if at a special session.

I cannot at this moment, with the permission of the Court, fail to recall the remark of Charles Sumner, upon the trial of President Johnson. Charles Sumner, who had stood for years as the incarnate political conscience of Massachusetts, when all the ques-

tions with respect to form and procedure and technical objections had been made, he burst out with the one question that should be considered here, as he said it should be considered there, "Is there any question possible except is this man guilty?" But it is well within the power and the right of the defendant to invoke any and every technicality, and therefore we have a right to expect that the Governor would not convene the Legislature in special session, and would not recommend for consideration the matter of his impeachment; and he has claimed to this time that he cannot be impeached, that he was not properly impeached, and that he cannot be here convicted because he did not recommend to the Legislature in special session the matter of his own impeachment.

One proper way of determining the intention of the Constitution, or of a constitutional provision, is to trace the several contentions with respect to it, to their ultimate consequences. It is right to consider the evil which would result from either alternative presented in the discussion, that of the learned counsel on the side of the defendant and that which is maintained on behalf of the managers. This principle is thoroughly settled, and those members of the Court who are all the time hearing discussed and examining legal questions, recognize it as a thoroughly settled proposition. The doctrine is fully elaborated in an opinion by Judge Haight in the 188th New York, and while, in that case, it was a dissenting opinion, it still is true that the doctrine that he enunciated there is well settled, and has met the approval of the courts over and over again. Another proposition upon which we may plant our feet with great surety is that it will not be assumed that, in the adoption of the Constitution, the people intended to reach either anarchy or disorder or public mischief of any kind. The direct contrary was intended to be attained—order and such provisions and restrictions as would surely make for order. I use the language here of *People v. The Board*, 155 N. Y.

Let us see, then, in the light of these principles of legal hermeneutics, what would be the consequence of the inability of the Assembly to convene under certain circumstances. I doubt whether I can add anything to what has been already so ably said

by Judge Parker, but I approach it from perhaps a little different angle of vision, and in a court composed of so many members as this, perhaps it is not improper that such different angles should be presented.

Assume that soon after the adjournment of the regular session a Governor should so far demean himself as to commit a series of acts flagrantly and admittedly violative of his duty — I do not need to suppose any particular offense; I want to bring to the attention of the Court the case where a Governor has so far demeaned himself that he has flagrantly and admittedly violated the duties of his office, and has violated the Constitution. You may call it that he has issued pardons to every criminal in the penal institutions of the State, that he has ordered out the militia and has taken into custody the person of every member of the Court of Appeals, including the Presiding Judge, whose person is at this moment as sacred in the minds of the people of this State as that of any man in our history. I do not need to specify any particular crime — any of these things. Assume that he takes the militia and marches them into war on our neighbor, Massachusetts — whatever it may be, so it is admittedly and flagrantly a violation of the Constitution, committed on the first day of April, 1913. Would the people of the State be compelled to sit helplessly by during the months until the first Wednesday in January following, until the Legislature came together in regular session under the direction of the Constitution, before staying his wicked acts? Oh, my friend says in his argument, it does not amount to much, it is only a few months anyway. Can any sane man who has any knowledge of State affairs, and who loves the orderly administration of the State government, consider for a single moment, with complacency, a claim of that kind? Is it true that if a wild man is in any office seven or eight months of the year, particularly in the office of Governor, it is not of consequence whether he is stayed during that length of time or not? Does it comport with the genius of our institutions? Is it true that there is meant to be a single moment of time, let alone eight months of time, when any official of the State is not deemed to be somewhere controlled and checked by some other department of the State? And this when the Legislature, in its passage of the

laws, is controlled and checked and its every act is subject to scrutiny and liable to be declared void by the high court over which the present presiding officer of this body presides; when, in terms, the court over which he presides is liable, in case it runs to any wrong which reaches the dignity of an impeachable offense, to have charges preferred against its members by the nearest representatives of the people in the State, the Assembly; when the Executive is liable, and the Lieutenant Governor is liable, to impeachment at any moment. Every State officer is liable to removal by the Governor. There is not a moment of time, and, your Honor, with all the tremendous learning which you have with respect to our laws and our system, with your tremendous knowledge of the structure and the genius of our institutions, I do not believe you can find, anywhere, any moment of time when the system contemplates that any public official shall stand unrestrained a single moment of his official life.

I think it was Trajan who said that unrestrained power makes a wild beast of any man, no matter how benevolent his previous intentions, and it was with that in mind that the wise fathers who formulated the constitutional system under which, with some changes, we have lived in contentment and peace and under which we have lain down and slept the sound sleep of free men for a century and a quarter — it was with that in mind that the checks and the balances of the Constitution were devised, that one department should control and balance another, that there should be no single public official or servant who should not be subject to surveillance and subject to reproof and subject to removal at any moment of time; it was with that in mind that they formulated the magnificent document which we call the Constitution.

Let each one reason it out for himself. It is enough to say that the Chief Executive of the State could do acts that might endanger the vital interests of the State and might bankrupt and ruin it. Such a juncture would, in the absence of constitutional direction or intention, require that the Assembly should come together upon any call. I do not limit it that it should be upon the call of the speaker. I do not limit it that it must be upon the call of the clerk. The Assembly with its solemn power of impeachment may get together upon any call and in any place and in any way. It

has that right and it would be its most sacred duty to exercise that right in case there existed the situation I have suggested to you.

Do the members of this Court recall (and I am sure that those members whose habit is to consider legal and constitutional questions and to study legal and constitutional history, to whom justice is a habit, do recall) the time when the clerk of the House of Representatives of the United States declined to call the roll of that body, so as to enable it to organize, and John Quincy Adams, who had been President of the United States but who in his work in the House was doing greater public service than any other in all his long and useful life, announced that, if the clerk would not call the roll, he himself would call it? The people of the United States applauded and approved and said Amen to his declaration and the House organized.

In the very room where I now stand, where this Court sits, Charles T. Saxton, a member of the Senate, the leader of the majority, the Lieutenant Governor being of the opposite political faith, when some question was pending and the Lieutenant Governor directed the clerk not to call the roll, and he did not, the question could not be put and an absolute standstill was at hand — Charles T. Saxton, rising in his place, called the roll himself; and the action thus taken was upheld by the Senate, as it was upheld by the overwhelming sentiment of the people of the State.

The question how to get the Assembly together, however, if its assemblage is necessary at all, and for the purposes of this argument I concede it is necessary to get together, is not here. Its members were together. They were on the other side of this building in the hall provided by the State for their accommodation. They were together.

I shall not stop for the argument — there is much of argument that the proposition at which my friend found time to turn and jest is correct — that if, under the juncture I have mentioned, 76 members of the Legislature should sign articles of impeachment or resolutions of impeachment, much of argument could be had that those powers thus exercised would be valid, because a vote does not of necessity mean an assemblage called to-

gether and a viva voce expression. Lexicographers define vote as any expression of will; and the expression of will is as thorough on articles of impeachment by the signatures of a majority as by the getting together and a viva voce vote; but I will pass that because it is not necessary here to claim that that could be done or that we press that proposition.

We may pass by the manner in which the Assembly shall convene, for it was convened. The members were physically together, and we come to the only question that needs to be considered in this connection, whether, being thus together, not being in session, but being thus together, it may institute proceedings to impeach the Governor, such impeachment proceedings not having been in terms included in the subjects enumerated by the Governor in calling the extraordinary session.

The language of our Constitution vesting the power of legislation in the Senate and Assembly is general and comprehensive, whereas the Federal Constitution is a grant of certain specified powers, reserving all others not named to the people themselves. By this grant in the Constitution in this State all legislative power not reserved is vested in the Senate and in the Assembly. But, in addition to this legislative power, the Assembly is vested by the Constitution with the power of impeachment, and this is not a legislative power. It is a judicial power. My friend, if he did not challenge that, slurred it over with the evident intention on his part of rather leaving it a doubtful proposition.

In the case of *People ex rel. McDonald v. Keeler*, which your Honor will recall, was a case in which a habeas corpus brought up the body of McDonald, who was committed for contempt by the order of the Assembly, he came to the Court of Appeals, and among other things — because it is a very long opinion I shall read only an extract, written by that master of the law, Charles A. Rapallo — in speaking of the division of the powers of the Legislature, it is said:

“But notwithstanding this general division of powers, legislative in the Legislature, the judicial in the judiciary and the executive in the executive, certain powers in their nature judicial are by the express terms of the Constitution vested in the Legislature.”

The power of impeachment is vested in the Assembly. Now, without exactly saying as an affirmative fact that the power of impeachment is judicial, by necessary inference, from the language that is used, Judge Rapallo does say that it is so.

The Assembly, in addition to this legislative power—the legislative which rests in the two houses—has this power of impeachment which rests in the Assembly alone, the Assembly having no separate power of legislation whatever. And the Assembly having impeached, the Senate, not in any legislative capacity—and that differentiation distinguishes the California case and the Florida case that my friend has cited—the Assembly having impeached, the Senate, not in any legislative capacity, not exercising its power of legislation, but by virtue of a grant separate from that legislative power, sits with the Court of Appeals in a strictly judicial capacity as a Court of Impeachment, not as a Senate at all, a court the members of which are required to take an oath other than, and additional to, the one taken by judges of the Court of Appeals and senators, that they will truly and impartially try the impeachment.

The learned counsel who preceded me has adverted to the fact that the senator members of this Court receive compensation more than the \$1,500 which is given by the Constitution to them as legislators, which demonstrates, if anything further is necessary to demonstrate, that the members of the Senate do not sit in any legislative capacity, the members of the Court of Appeals do not sit as judges of the Court of Appeals, but all together they sit in a Court of Impeachment in a strictly judicial capacity. Impeachment by the Assembly then, not being a legislative act, and its trial by the Court of Appeals and the Senate not being a legislative act, but both being judicial, this inhibition of article 4, section 4, “at extraordinary sessions,” etc., does not apply to, nor prevent, impeachment proceedings being initiated by the Assembly at the time of an extraordinary session of the Legislature called by the Governor, even if such call was for specified purposes and did not include impeachment.

This provision of the Constitution is in the section defining the duties and powers of the Governor. It is entirely different and apart from the grant of legislative power. Article 6 is the judicial

article of the Constitution; article 3, the legislative. But this grant is in article 4, section 4, and, after prescribing that the Governor shall be Commander in Chief of the military and naval forces of the State, it says:

“He shall have power to convene the Legislature or the Senate only on extraordinary occasions; and at extraordinary occasions no subject shall be acted upon except such as the Governor may recommend for consideration.”

Unless the limitation claimed is found in this language it is found nowhere. There is elsewhere in the whole Constitution no word that can be held to limit anything concerning the general grant of the power of impeachment to the Assembly. No subject shall be acted upon except such as the Governor may recommend for consideration. Recommend to whom? Of necessity to the bodies whom he may thus call together under the provisions of the first of the two sentences; that is, the Legislature or the Senate only. The Assembly is not mentioned as one that may be convened in extraordinary session except as a part of the Legislature. Recommend then to whom? Recommend to the Legislature, if that is the body that has been called together, or to the Senate, if it has been called together alone. Acted upon by whom? Of necessity the same bodies mentioned in the antecedent sentence, the Legislature if both bodies are assembled, or the Senate if convened alone. No other result can be reached from any analysis of the provision contained in the two sentences under scrutiny.

Of course, your Honors sitting in the Court are familiar with the rule that a relative word relates to the next antecedent. That is a rule of construction. That is a rule we had from the time we first commenced to study grammar.

This language of the Constitution imperatively demands construction. It does not literally mean that no member can act upon, for example, his own affairs while attending an extraordinary session. It must be construed to mean that it is a public business that cannot be acted upon. It is then necessary to inquire what public business may not be acted upon. Answering this, it will not do to say no public business, because there is certain public business that may surely, without challenge, be

done at extraordinary sessions, and business that is not recommended by the Governor.

Let us suppose, to illustrate that, the Legislature being convened in extraordinary session, the Assembly finds that it has been deprived by death or resignation of its speaker, its clerk or any officer whom it is empowered to elect. I do not now speak of any officer within the power of appointment of the speaker, like a chairman of a committee. I am speaking and speaking only of those officers of the Assembly which the body itself is required to elect.

Does my friend gravely contend that the Assembly, being together, and finding that its speaker is dead or has resigned, cannot, without the gracious favor of the Governor, contained in a message to it, elect his successor or the successor of the clerk? If he does —

Mr. Marshall.— (Interrupting) I do not.

Mr. Brackett.— I am glad that my friend does not so claim, because I have a couple of cases on the subject, that would annihilate him.

Mr. Marshall.— It is simply a matter of the organization of the house.

Mr. Brackett.— I am coming to procedure and organization presently, my brother.

The President.— Continue your address.

Mr. Brackett.— Precisely such an occasion arose when Mr. Speaker Henry J. Raymond was so sick that he was unable to come to an extraordinary session of the Assembly, the Assembly being called together for the specific purpose, as I recall, of passing the appropriation bills, but it does not matter what, because the election of speaker, or the successor of the speaker, was not mentioned in the call. Thereupon, the Assembly, deeming it unnecessary to inquire of any human being whether it could elect a successor to Mr. Raymond, elected Mr. Varnum as the speaker pro tempore, for the purpose of presiding over the Assembly until Mr. Speaker Raymond should be present.

In the year 1905, in this very room, when the Legislature was called together by Governor Higgins for the single and sole purpose of considering the matter of the investigation into the acts of Justice Hooker, at that session the first thing done was that James S. Whipple, the clerk of the Senate, resigned. Thereupon Lafayette B. Gleason was elected to the position of clerk, and that without recommendation on the part of the Governor at all.

Other illustrations will occur to anybody at all familiar with legislative life.

If the Assembly desired to change its standing committees at such special session, there can be no doubt that it could do so without any recommendation from the Governor. If it desired to create a new standing committee or in any way amend its rules it could do the same. To sum up, there are many things that the Assembly can do alone, that do not involve legislation that must be passed on by both houses, which it can do at any time that it is together, without any recommendation from the Governor, and in spite of any recommendation from the Governor.

There is, then, some public business that the Assembly, as an Assembly, in its own proper body may do during an extraordinary session, without a recommendation from the Governor. And this illustrates and enforces the proposition which I made before that it is necessary to construe this language of the Constitution.

And where, in such construction, is the dividing line between what it may do and what it may not do? It is necessary for us to fix that line somewhere. It is not fixed by the language of the Constitution itself. It must be done by construction, and there is no other line of demarcation known to man, and the ingenuity of all this great Court can find no other line than the one drawn between legislative business, as such, and the business strictly of the Assembly, as a separate body; and every one of us can search in vain for any other logical or natural line between what may and what may not be done by the Assembly without recommendation by the Governor.

Whatever shall be said as to whether impeachment by the Assembly is a judicial or political act, no one can ever claim it is a legislative one. Lexicographers' definitions as to what are legislative acts are entirely conclusive on the subject. Not being a legisla-

tive act it is not prohibited at any time the Assembly takes up the subject.

It is the right of the Governor to specify what legislation shall be considered at an extraordinary session. The Constitution so prescribes. The Legislature at its regular session must complete such general legislation as it cares to initiate. Thereafter, the Governor alone shall prescribe what legislation shall be considered at any extraordinary session, but this limitation is only as to legislation. The word "subject" in this limitation, section 4, article 4 — the thing that may not be acted upon unless — means "subject of legislation," and can mean nothing else; and, so meaning, there is no constitutional restriction upon impeachment proceedings at a special session, if they are needed in the protection of the State or its dignity.

The article in which this clause is placed, as I said before, is the one granting powers to the Governor. The language and its context make this a natural and logical rendering of the provision, and it is complete justification for instituting and completing impeachment proceedings, if the facts called to the attention of the Assembly are deemed to require such action.

In the recent application made by some one on behalf of the Governor — although afterwards disavowed by him — which involved the power of this defendant to issue a pardon after articles of impeachment had been delivered to the Senate, Judge Hasbrouck, who as a practitioner at the bar had large experience in the public service, having been an assemblyman, and later First Deputy Attorney General, and then a Justice of the Court, held that the Assembly had the power of impeachment at all times; that it was not shorn of such power because the Governor had called an extraordinary session of the Legislature; that from the time the articles were signed, the official functions of the defendant were suspended and devolved upon the Lieutenant Governor, and that, after the presentment of such articles, the defendant could not issue a pardon or do any other act as Governor. This opinion of the justice is powerful and convincing.

There is another ground which was elaborated by the learned Attorney General of the State, and which requires but a single step further than he went, in order completely and entirely to

justify the power of impeachment at a special session of the Legislature, and that is this:

The Governor in calling the Legislature together, used this language — I will not say this was in the proclamation or the message, because it is not of consequence; it is in one —

“Let me, therefore, renew my former recommendations, reiterate all that I have previously said, and again sincerely and earnestly urge the Legislature to pass a direct primary bill that shall provide,” etc.

The opinion of the Attorney General was rendered to the effect that the question of amending the election law having been submitted to the Legislature, that, therefore, it was competent for the Assembly and the Senate to add to the powers of a joint committee, theretofore in existence, by giving it power to investigate frauds upon the election law committed at the last election.

This construction is upheld by the language of the court in *People v. Keeler*, referred to before, where Judge Rapallo says:

“In many cases it may be indispensable to intelligent and effectual legislation to ascertain the facts which are claimed to give rise to the necessity for such legislation and the remedy required.”

So, when the gubernatorial recommendation mentioned the amendment of the election law as a thing to be considered at the extraordinary session, it gave to that body the right to legislate on the subject. To legislate intelligently and effectually the two houses had the right, and very likely it was their duty, to investigate. To investigate, a committee was the only practicable means. When, therefore, the Legislature invested the Frawley committee, already in existence for some purpose, with the power to investigate as to the election law, it was proceeding strictly within the lines of the message calling the Legislature together.

The case of the *People v. Keeler*, already cited, holds in the broadest terms the right of a legislative committee to investigate for legislative purposes, and in pursuing such purpose, to compel the attendance of witnesses and to punish for contempt. The

Supreme Court recognized the same power if the resolution for the investigation avowed a purpose to impeach a secretary. It was the case of Kilbourn against Thompson, an action for false imprisonment, Thompson, the sergeant at arms, having arrested Kilbourn for contempt. The court held the committee had a right to investigate if the preamble of the resolution naming it avowed that the purpose was the impeachment of a secretary. To the same effect is the case of the People v. Sharp and the case of People v. Milliken.

Having the power to legislate in the way of amendment to the election law, and having thus the power to investigate for the purpose of enabling it to legislate intelligently in the course of its investigation, the joint committee uncovers a series of crimes committed by the Executive while a candidate and Governor-elect, the most unique in detail ever spread upon record.

Having properly discovered these crimes by this investigation authorized at the extraordinary session, it was the plain duty, as it was the right, of the Assembly at once to institute impeachment proceedings against the guilty official, as a part of its investigation.

If impeachment proceedings are not legislative in their character, then they are not prohibited at the extraordinary session.

If, by any circuitry of reasoning, they are held legislative proceedings, then they are strictly within the gubernatorial power of recommendation to the Legislature before quoted, as devising methods effectually to prevent fraud on the election law.

I want to submit, not as a matter of merriment, but in all sincerity, and in all solemnity, that there has been no proceeding taken in this State in a quarter of a century or more that will more tend to prevent fraud upon the election laws than this impeachment being prosecuted here today.

It is argued further by the learned counsel that if this be so, it must be shown that notice was sent to every member of the Assembly that the impeachment of the Governor was to be considered, before the proceedings were taken up in that body, in order to be regularly here, and that the question may be here examined. I deny the claim.

Aside from the question of the jurisdiction of the Assembly,

the resolution of impeachment and the circumstances under which it was adopted may not be inquired into here. The resolution is here. The adoption in the Assembly is attested by the journal of that body. Its receipt by the Senate, as well as the receipt of the articles of impeachment adopted by the Assembly, are attested by the Senate Journal.

The journals are final and conclusive evidence of the facts stated. The Court cannot go back of them to examine into the circumstances nor the motive of the adoption of either of them. The proceedings are duly proven by the respective journals, the last word on the subject that may be considered. The certificate of the presiding officer of the Assembly that the resolution of impeachment was duly passed, and that the articles of impeachment were duly adopted, on file with the clerk of the Senate here, are before this Court and proper in form; and they are conclusive evidence of the adoption of the articles and of the resolution, and this Court may not go behind such certificate if it is regular in form; and it is regular in form.

If there were any defects in the certificate to the articles, or to the resolution of impeachment, then it would be permissible for the Court to go to the Journal of the Assembly, but, inasmuch as that journal shows the proper adoption of the resolution of impeachment, and also the adoption of the articles of impeachment, precisely as does the certificate, the same result obtains.

The ultimate to which this Court can go is to the Assembly Journal, which is conclusive. That was held in *People against Commissioners*, in 34 N. Y., and *Rumsey against Railroad*, in 130 N. Y.

There has been much said on the part of the defendant as to the jurisdiction of the Assembly to adopt either impeachment or the articles thereof at an extraordinary session of the Legislature, but we have before seen the grant of jurisdiction in the broadest terms, and jurisdiction being granted by the language that the Assembly shall have the power to impeach by a vote of the majority of all the members elected, jurisdiction of treating the subject matter of impeachment is then plenary. It is granted in the utmost to the Assembly. It there rests and unless this jurisdiction is limited by some other provision of the Constitution, the discussion is over.

Given this fact of jurisdiction of the subject matter, there being no question of the jurisdiction of the defendant's person, unless there is elsewhere in the instrument some limitation in the Constitution itself, some limitation of rules of procedure (and aside from jurisdiction all else is procedure), the power of impeachment is unlimited, to be exercised by the Assembly in its own way. The way that the body shall get together, the place where, or the time when, the notice that is required to be given of the meeting, if any, the rules under which it shall work — all these things are procedure, pure and simple, and nothing else.

And of all these the Assembly is the sole and only judge, for by article 3, section 10, "each house shall determine the rules of its own proceedings, and be the judge of the elections, returns and qualifications of its own members; shall choose its own officers."

Can this Court go into the procedure or the motives by which or for which the articles were adopted? The Supreme Court is given its jurisdiction by section 1 of the same article, in no broader terms than is this power of impeachment given to the Assembly. "The Supreme Court is continued with general jurisdiction in law and in equity."

Suppose there had been no rules of procedure prescribed by the Legislature, or authority to the court to prescribe rules of procedure, and there had been no Code of Civil Procedure or of Criminal Procedure, would it still be said that the Supreme Court would not have power to go ahead under this general grant and organize itself in its own way, and exercise its jurisdiction?

The power to impeach in the Assembly is just as broad as the grant of general jurisdiction, both in law and in equity, given to the Supreme Court.

There have been provided for the Assembly neither statute directions nor rules, as to its procedure in the adoption of the resolution of impeachment, nor the proceedings prior thereto. It may and must proceed in its own way under this broad grant of power. Its certificate is here that it has proceeded, and that the result is the resolution of impeachment and the articles. As we have seen, this certificate is the best and highest evidence of the result of the Assembly's work, back of which we cannot go.

When it comes, then, that there is here presented a challenge of the jurisdiction of the Assembly to adopt a resolution, or articles of impeachment, at an extraordinary session of the Legislature, that challenge is met by profert of the grant of power in the Constitution; and nothing that can be said outside of the Constitution can lessen the completeness of the answer to such challenge of power.

Having the power, the Assembly has acted by some method of procedure. Here is its certified result. Its jurisdiction is successfully defended by reading its grant of power; its procedure, or the result of its procedure, we may not challenge.

In the presentation of an argument in the proceeding before Mr. Justice Hasbrouck, to which I have before adverted, the very learned, venerable Judge and General Benjamin F. Tracy conceded and not only conceded, but claimed and argued, that the Assembly has this power of impeachment, but to be exercised only at a regular session.

The argument concedes too much. If the Assembly has the power of impeachment one moment of time in all the year, it has it and may exercise it at any moment in all the year, unless there is somewhere else in the Constitution a limitation. The fact that the Governor has called an extraordinary session of the Legislature, or of the Senate, does not and cannot take this jurisdiction away. There is no preference in the Constitution of one time over another. Unless the Constitution itself forbids the exercise of such power of impeachment during some particular portion of the time, unless it has formulated some rules of procedure, or authorized some person or body, other than the Assembly, to do so, then it rests that at any time and at all times, under such rules of procedure as it sees fit to use, the Assembly may proceed to the exercise of its unlimited power of impeachment granted by section 13 of article 6, the jurisdiction to impeach being always in the Assembly, whether it be in general session or extraordinary session.

That being so, every member of the Legislature is in law bound to know that the subject may come up at any time when the members of the Legislature are together, without any notice whatever.

In extraordinary sessions, to the subjects recommended by the

Governor, the law adds always, in effect, the subject of the impeachment of any officer. The law adds them because by the Constitution the power to impeach is always there, at regular and at extraordinary sessions, and is liable to be exercised at any time when the Assembly is convened, whether previous notice of the intention to exercise that power is given to the members of the body or not.

If this be so, no notice was required to be given to any member that the subject of impeachment would be taken up, any more than notice is required that some particular matter of general legislation will be taken up at any regular session.

In the case in California, from which my friend read at such length, it was held, in a long opinion, that the authority to pass a constitutional amendment at a special session was a legislative act, and therefore could not be done at a special session without the recommendation of the Governor. Of course it is a legislative act.

You who are members of the Senate know that there is no step in the progress of a joint resolution proposing to amend the Constitution that is not also taken in the passage of a bill. There is no step taken in the passage of a bill that is not taken in the passage of a constitutional amendment. It is strictly and entirely a legislative act under the power granted by the Constitution, and that differentiates the case in 130 California from the case at bar; and it makes the 63d, I think it is, of California, the strongest precedent on the subject. With respect to the Florida case, all I need to say is that the single question decided, and your Honors may search the opinion from beginning to end, is that when a quorum of the Senate was not present, the articles of impeachment could not be presented. The impeachment was declared illegal for that single and sole reason, simply that, when eight members of the Senate were present, not being a majority of the complete number required by the Constitution, those eight members could not receive the articles of impeachment, and for that reason they never had been properly preferred.

That does not exist here for two reasons. First a majority of the Senate were here when the articles were received and the journal so says; and that is conclusive on the subject. But the

complete and perfect further answer is that, in this case, the articles of impeachment do not have to be presented to the Senate at all.

Under the statute, the articles of impeachment when adopted by the Assembly are delivered to the President of the Senate, and that answers the very learned inquiry upon which my friend planted himself with such comfort to himself, that there was no way that the Senate could get together to receive the articles in case they were adopted by the Assembly. He asked, conceding the proposition that the Assembly did have the power to get together and adopt the articles, what good would it do, because they could not be presented to the Senate.

The Assembly, being in session, adopting the articles, can send to the President of the Senate, wherever he may be, and present the articles to him under that provision of the statute which says they shall be delivered, not to the Senate, but to the President of the Senate; and thereupon it becomes the duty of the President of the Senate, not having any relation at all to the body itself, whenever and wherever the articles were presented to him, the statute puts upon him the duty of giving notice to the members of the Court and of calling together, not the Senate at all — because if the Senate had not been in session a minute of time since it adjourned at the close of the regular meeting the situation would be the same — not the Senate, but the members of the Court of Impeachment for the purpose of trying the articles thus adopted.

Argument for the Managers on the question of impeachable offenses, September 23, 1913.

Mr. Brackett.—With the permission of the Court: The articles here charge impeachable offenses — if proven as set out, they require a verdict of guilty from this Court.

Briefly summarized, the first article charges the filing of a false statement of contributions to the defendant and expenditures by him, while a candidate for Governor, in violation of the election law.

The second, the same, in violation of the Penal Law, and perjury in making oath to the correctness of such statement.

The sixth, the remainder of the three under attack by this pleading, charges larceny by the defendant in having converted and appropriated to his own use campaign contributions made to him by various persons named.

It will be seen, therefore, that all three articles thus challenged by this pleading charge the defendant with crimes.

We are not now arguing the completeness or sufficiency of form of the articles, but the broader question of what constitutes impeachable offenses, and whether, the form of the articles being held good in whole, or in part, and the facts charged proven, the defendant is guilty of offenses for which impeachment may be had.

Whenever an impeachment trial has been had in this western hemisphere, there has arisen the perpetually recurring question, "What is an impeachable offense?"

The question has, and always, developed violently antagonistic opinions. On the one hand has been the claim that nothing but indictable crimes are grounds of impeachment and that the proceeding is highly penal and subject to all the strictness of procedure of the criminal law. On the other extreme is the contention that impeachment is not a prosecution for crime at all, but a mere inquest of office, a political prosecution pure and simple, instituted solely for the protection of the government, or

of the state. There is room for much of research, and very curious learning might be exhibited by one who cares to go exhaustively into the distant history of the general subject, and the precedents. The arguments on either side of the question are endless. But no attempt at detailed examination will here be made on behalf of the managers. The brief of Judge William Lawrence, revised by General Butler, on the one hand, and the arguments of Judge Benjamin R. Curtis and Mr. Evarts on the other, on the trial of President Johnson, have rendered much research back of the time of the Johnson trial largely supererogatory, if not distinctly useless, on the subject of what constitutes offenses for which impeachment may be had.

No one with any pretensions to a knowledge of the constitutional or legal history of the country can fail to feel assurance from the great names of those who argued, that every possible phase of the question was discussed and that every authority then existing and pertinent, was cited and analyzed.

In the Lawrence-Butler brief on the Johnson trial, an impeachable offense is thus defined:

“We define, therefore, an impeachable high crime or misdemeanor to be one in its nature of consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, with violating a positive law, by the abuse of discretionary powers from improper motives, or for any improper purpose.”

Another most valuable contribution to the question was made by the House Judiciary Committee in 1912 in the Archbald case. In this report Judge Clayton argues from the lectures of Richard Wooddesson in Law Lectures delivered in Oxford in 1777 (vol. 2, pages 355-58) that the influences of magistrates and officers intrusted with the administration of public offices, and the abuses of their delegated powers “may not unsuitably engage the authority of the highest court and the wisdom of the sagest assembly. The Commons, therefore, as the grand inquest of the nation, became

suitors for penal justice and they cannot consistently, either with their own dignity or with safety to the accused, sue elsewhere but to those who share with them in the Legislature. On this policy is founded the origin of impeachments."

On the functions of impeachment, quotation is made by Clayton from Rawle on the Constitution (p. 211):

"The delegation of important trusts affecting the higher interests of society, is always from various causes liable to abuse. The fondness frequently felt for the inordinate extension of power, the influence of party and of prejudice . . . are sometimes productions of what are not unaptly termed 'political offenses' which it would be difficult to take cognizance of in the ordinary course of judicial proceeding."

And this from Story (5th ed., vol. 1, p. 584):

"One cannot but be struck, in this slight enumeration, with the utter unfitness of the common tribunals of justice to take cognizance of such offenses, and with the entire propriety of confiding the jurisdiction over them to a tribunal capable of understanding and reforming and scrutinizing the policy of the state, and of sufficient dignity to maintain the independence and reputation of worthy public officers."

The report of Judge Clayton then continues:

"The term 'misdemeanor' has a twofold legal significance. Under the common law it signifies a criminal offense, not amounting to felony, which is punishable by indictment, or other special criminal proceeding. As applied to civil officers, in the sense of the *lex parliamentaria* it signifies maladministration or misbehavior in office, irrespective of whether such conduct is or is not indictable. It is well established by the authorities that impeachable offenses under the British Constitution and under our Constitution are not limited to statutable crimes and misdemeanors, or to offenses indictable under the common law and triable in the courts of ordinary jurisdiction."

In his Commentaries on the Constitution, the learned John Randolph Tucker defines impeachable offenses as follows (vol. 1, sec. 200), giving only part of his definition, beginning with his third subdivision:

“(c) High crimes and misdemeanors. What is the meaning of these terms? Much controversy has arisen out of this question. Do these words refer only to offenses for which the party may be indicted under the authority of the United States? Do they mean offenses by the common law? Do they include offenses against the laws of the states, or do they mean offenses for which there is no indictment in the ordinary courts of justice? Or do they include mal administration, unconstitutional action of an officer wilful or mistaken, or illegal action wilful or mistaken?”

Coming down to subdivision g:

“(g) . . . Again, if the judge is drunken on the bench this is ill behavior, for which he is impeachable. And all of these are generally criminal, or misdemeanor—for misdemeanor is a synonym for misbehavior. So, if he omits a judicial duty, as well as when he commits a violation of duty, he is guilty of crime or misdemeanor; for, says Blackstone, ‘crime or misdemeanor is an act committed or omitted in violation of a public law either forbidding or commanding it.’”

Thereupon, at 12.30 p. m., the Court declared a recess until 2.30 p. m.

AFTERNOON SESSION

Pursuant to adjournment, Court convened at 2.30 p. m.

The roll call showing a quorum to be present, Court was duly opened.

The President.—Senator Brackett, if you will resume your argument.

Mr. Brackett.—With the permission of the Court: I was reading when we adjourned this morning from the Commentaries

on the Constitution by John Randolph Tucker. Continuing and quoting from that work:

“To confine the impeachable offenses to those which are made crimes or misdemeanors by statute or other specific law, would too much constrict the jurisdiction to meet the obvious purpose of the Constitution, which was, by impeachment, to deprive of office those who by any act of omission or commission showed clear and flagrant disqualification to hold it.”

With the permission of the Court, I will read the last three lines again.

“ . . . would too much constrict the jurisdiction to meet the obvious purpose of the Constitution, which was, by impeachment, to deprive of office those who by any act of omission or commission showed clear and flagrant disqualification to hold it.”

Cooley, in his Principles of Constitutional Law, says:

“The offenses for which the President or any other officer may be impeached are such as in the opinion of the House are deserving of punishment under that process. They are not necessarily offenses against the general laws. In the history of England, where the like proceeding obtains, the offenses have often been political, and in some cases for gross betrayal of public interests punishment has very justly been inflicted on cabinet officers.”

I recall one case that is cited where a trial was had for administering medicine to the king without the prescription of a physician.

“It is often found that offenses of a very serious nature by high officers are not offenses against the criminal code, but consist in abuses or betrayals of trust, or inexcusable neglects of duty, which are dangerous and criminal because of the immense interests involved, and the greatness of the trust which has not been kept. Such cases may be left to be dealt with on their own facts and judged according to their apparent deserts.”

George Ticknor Curtis, in his work, says this (vol. 1, pp. 481-82):

“Among the separate functions assigned by the Constitution to the Houses of Congress are those of presenting and trying impeachments. An impeachment, in the report of the committee of detail, was treated as an ordinary judicial proceeding and was placed within the jurisdiction of the Supreme Court. That this was not in all respects a suitable provision will appear from the following considerations: Although an impeachment may involve an inquiry whether a crime against any positive law has been committed, yet it is not necessarily a trial for crime, nor is there any necessity, in the case of crimes committed by public officers, for the institution of any special proceeding for the infliction of the punishment prescribed by the laws, since they, like all other persons, are amenable to the ordinary jurisdiction of the courts of justice in respect of offenses against positive law. The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. Such a cause may be found in the fact that either in the discharge of his office or aside from its functions he has violated a law or committed what is technically denominated a crime. But a cause for removal from office may exist where no offense against positive law has been committed, as where the individual has, from immorality or imbecility or maladministration, become unfit to exercise the office. The rules by which an impeachment is to be determined are therefore peculiar and are not fully embraced by those principles or provisions of law which courts of ordinary jurisdiction are required to administer.”

Watson, in his work on the Constitution, phrases it thus (vol. 2, p. 1034):

“A misdemeanor comprehends all indictable offenses which do not amount to a felony, as perjury, battery, libels, conspiracies, attempts and solicitations to commit felonies, etc. These seem to be the definitions of these terms at common law but it would be strange if a civil officer could be im-

peached for only such offenses as are embraced within the common law definition of 'other high crimes and misdemeanors.' There is a parliamentary definition of the term 'misdemeanor,' and a modern writer on the Constitution has said: 'The term "high crimes and misdemeanors" has no significance in the common law concerning crimes subject to indictment. It can only be found in the law of Parliament and is the technical term which was used by the Commons at the Bar of the Lords for centuries before the existence of the United States.' Synonymous with the term 'misdemeanor' are the terms misdeed, misconduct, misbehavior, fault, transgression."

Again (vol. 2, pp. 1036, 1037):

"A civil officer may so behave in public as to bring disgrace upon himself and shame upon his country, and he may continue to do this until his name would become a national stench, and yet he would not be subject to indictment by any law of the United States, but he certainly could be impeached. . . .

"It is not essential that an offense should be committed in an official capacity in order that it may come within the purview of the constitutional provisions relating to impeachments."

Story, of whom some of you will remember Wendell Phillips said that if ever there was anyone a little crazy on the subject of the independence of the judiciary it was Joseph Story, says this (5th ed., vol. 1, secs. 796-99):

"Is the silence of the statute book to be deemed conclusive in favor of the party until Congress have made a legislative declaration and enumeration of the offenses which shall be deemed high crimes and misdemeanors? If so, then, as has been truly remarked, the power of impeachment, except as to the two expressed cases, is a complete nullity, and the party is wholly dispunishable, however enormous may be his corruption and criminality."

“ Congress has unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct and the rules of proceeding, and the rules of evidence, as well as the principles of decision, have been uniformly regulated by the known doctrines of the common law and parliamentary usage. In the few cases of impeachment which have hitherto been tried, no one of the charges has rested upon any statutable misdemeanors.”

In the American and English Encyclopaedia of Law, second edition (vol. 15, pp. 1066-68) it is said :

“ The Constitution of the United States provides that the President, Vice President and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. If impeachment in England be regarded merely as a mode of trial for the punishment of common law or statutory crimes, and if the Constitution has adopted it only as a mode of procedure, leaving the crimes to which it is to be applied to be settled by the general rules of criminal law, then, as it is well settled that in regard to the national government there are no common law crimes, it would seem necessarily to follow that impeachment can be instituted only for crimes specifically named in the Constitution or for offenses declared to be crimes by Federal statute? This view has been maintained by very eminent authority, but the cases of impeachment that have been brought under the Constitution would seem to give to the remedy a much wider scope than the above rule would indicate. In each of the only two cases of impeachment tried by the Senate in which a conviction resulted the defendant was found guilty of offenses not indictable either at common law or under any Federal statute, and in almost every case brought, offenses were charged in the articles of impeachment which were not indictable under any Federal statute, and in several cases they were such as constituted neither a

statutory nor a common law crime. The impeachability of the offenses charged in the articles was in most of the cases not denied. In one case, however, counsel for the defendant insisted that impeachment would not lie for any but an indictable offense; but after exhaustive argument on both sides this defense was practically abandoned. The cases, then, seem to establish that impeachment is not a mere mode of procedure for the punishment of indictable crimes; that the phrase 'high crimes and misdemeanors' is to be taken, not in its common law, but in its broader parliamentary sense, and is to be interpreted in the light of parliamentary usage; that in this sense it includes not only crimes for which an indictment may be brought, but grave political offenses, corruption, mal administration, or neglect of duty involving moral turpitude, arbitrary and oppressive conduct, and even gross improprieties, by judges and high officers of State, although such offenses be not of a character to render the offender liable to an indictment either at common law or under any statute. Additional weight is added to this interpretation of the Constitution by the opinions of eminent writers on constitutional and parliamentary law and by the fact that some of the most distinguished members of the convention that framed it have thus interpreted it."

Black, in his work on Constitutional Law, says (2d ed. pp. 121-22):

"Treason and bribery are well-defined crimes. But the phrase 'other high crimes and misdemeanors' is so very indefinite that practically it is not susceptible of exact definition or limitation, but the power of impeachment may be brought to bear on an offense against the Constitution or the laws which, in the judgment of the House, is deserving of punishment by this means or is of such a character as to render the party accused unfit to hold and exercise his office. It is, of course, primarily directed against official misconduct. Any gross malversation in office, whether or not it is a punishable offense at law, may be made the ground of an impeachment. But the power of impeachment is not

restricted to political crimes alone. The Constitution provides that the party convicted upon impeachment shall still remain liable to trial and punishment according to law. From this it is to be inferred that the commission of any crime which is of a grave nature, though it may have nothing to do with the person's official position, except that it shows a character or motives inconsistent with the due administration of his office, would render him liable to impeachment. It will be perceived that the power to determine what crimes are impeachable rests very much with Congress. For the House, before preferring articles of impeachment, will decide whether the acts or conduct complained of constitute a 'high crime or misdemeanor.' And the Senate in trying the case, will also have to consider the same question. If, in the judgment of the Senate, the offense charged is not impeachable, they will acquit; otherwise, upon sufficient proof and the concurrence of the necessary majority, they will convict. And in either case there is no other power which can review or reverse their decision."

Judge Clayton, in the Archbald report, then continues (p. 26):

"In 1862, West H. Humphreys, United States District Judge for the District of Tennessee, was impeached on several specifications, one of which was based on his action in making a speech at a public meeting, while off the bench, inciting revolt and rebellion against the Constitution and government of the United States. The evidence clearly showed that he was in no wise acting in a judicial capacity, yet he was convicted on this charge. A number of the impeachments of judges of the several states of the Union have been predicated on various acts of debauchery entirely separate from the performance of their official duties. Any conduct on the part of a judge which reflects on his integrity as a man or his fitness to perform the judicial functions should be sufficient to sustain his impeachment. It would be both absurd and monstrous to hold that an impeachable offense must need be committed in an official capacity. If such

an atrocious doctrine should receive the sanction of the congressional authority there is no limit to the variety and the viciousness of the offenses which a federal judge might commit with perfect immunity from effective impeachment."

On the Johnson trial Charles Sumner held: "That this high tribunal is the sole and exclusive judge of its own decision in such case, and each case is to be decided upon its own circumstances in the patriotic and judicial good sense of the representatives of the states." To this opinion, the biographer of Charles Sumner—your honors will find it in the 30th American Statesmen Series—the learned Moorfield Storey, then and still of the Massachusetts bar, says: "He voted without hesitation for conviction, and while it is now clear that no especial harm was done through the brief remnant of Mr. Johnson's term, and many felt that a dangerous precedent was avoided, we may hereafter find that under the common law a dangerous precedent was established and learn to consider the doctrine of Sumner the safer for the country."

In his admirable work on the Constitution, Roger Foster gives this summary, and in any examination that is given to the subject, I think I can truthfully say to your Honors that the work of Mr. Foster is as luminous and as satisfactory as any that will be found anywhere. In his work (vol. 1, p. 582), he says:

"Four theories have been proposed. That, except treason or bribery, no offense is impeachable which is not declared by a statute of the United States to be a crime subject to indictment. That no offense is impeachable which is not subject to indictment by such a statute or by the common law. That all offenses are impeachable which were so by that branch of the common law known as the law of Parliament. And that the House and Senate have the discretionary power to remove and stigmatize by perpetual disqualification an officer subject to impeachment for any cause that to them seems fit."

The learned author then continues (pp. 585–86):

"The first two theories are impracticable in their operation, inconsistent with other language of the Constitution

and overruled by precedents. If no crime, save treason and bribery, not forbidden by a statute of the United States, will support an impeachment, then almost every kind of official corruption or oppression must go unpunished. Suppose the Chief Justice of the United States were convicted in a state court of a felony or misdemeanor, must he remain in office unimpeached and hold court in a state prison? . . . Some advocates have gone so far as to maintain, by a misapplication of a term of the common law, that the proceedings on an impeachment are not a trial, but a so-called inquest of office, and that the House and Senate may thus remove an officer for any reason that they approve. That Congress has the power to do so may be admitted. For it is not likely that any court would hold void collaterally a judgment on an impeachment where the Senate had jurisdiction over the person of the condemned. And undoubtedly a court of impeachment has the jurisdiction to determine what constitutes an impeachable offense. But the judgment of the Senate of the United States in the cases of Chase and Peck, as well as those of the state senates, in the different cases which have been before them, have established the rule that no officer should be impeached for any act that does not have at least the characteristics of a crime."

And there, I believe, you find the precise and the true rule that no one should be impeached for an act which does not have at least some of the characteristics of a crime.

There is nothing thus far quoted from the eminent authorities who have written on the subject, but only with reference to the Federal Constitution, that is not applicable to the situation existing here, under the Constitution of the State. While the Federal Constitution declares treason and bribery to be impeachable, we have omitted the discussion as to those terms and have limited it to those upon the words "high crimes and misdemeanors," which are equally applicable to a proceeding either before the Federal tribunal of impeachment or that of the State.

With this (considering the magnitude of the questions involved and the flood of arguments that have been presented in the discussions on the subject) brief collection of authorities on the sub-

ject, the managers will not go further into the question as to whether impeachable offenses are limited to indictable crimes, except to annex hereto as an addendum a digest of every case of impeachment in the Congress, and every one in a state jurisdiction that has come to counsel's attention. Your Honors will find such an addendum annexed to the brief. I think I should in fairness make one correction, and that is in the case of Butler of Nebraska. The addendum states that he was impeached at a special session. That was based upon the remarks of one of the managers, Mr. Doone, a report of which was found in the Nebraska Public Journals in our State Library. Judge Parker, on further investigation, has satisfied himself that such was not the case, that the impeachment was not at a special session of the Legislature. With that exception, so far as I know, the addendum is entirely correct,—and we have already passed the question of the right to impeach at a special session.

It is manifest, on both reason and authority, overwhelming authority, that impeachable offenses are not limited to indictable crimes, but that impeachment may be had, not only for statutable crimes, but for anything in the nature of crime that denominates and demonstrates unfitness to exercise the functions of office; anything that evidences unfitness to associate with decent people who must meet the officials doing the work of the state. As said by Hawkins, concerning the judiciary, "the authority of government cannot be maintained unless the greatest credit be given to those who are so highly intrusted with the administration of public justice."

But in these articles that are here challenged by this plea, all of them charge crime. One of them charges a misdemeanor in the failure to file the statement of receipts and expenditures prescribed by the election law; one of them charges perjury in making a false affidavit as to the correctness of the statement filed with the Secretary of State, while the third under challenge—the sixth in number of the articles—charges larceny. All these matters are punishable by fine or imprisonment, or both, which brings them exactly within the definition of crime. This is no trial for disgusting manners, nor for lack of dignity, nor for immeasurable boastings—all of these may be offensive to the

last degree, but they are not in the charges here, nor impeachable. The defendant is charged with crimes. So the controversy that has raged round the point whether crime must be charged against the offender, or a mere violation of duty, positive or negative, is sufficient to convict, is not here at all.

The defense, however, rests, in large part at least, upon the proposition that, while crimes are charged against the defendant, they are not crimes committed during his official term nor relating to the duties of his office, and, therefore, he may not be impeached because of them.

If we reflect a moment on the object of the grant of the power of impeachment, the fallacy of this contention is apparent. The power was granted "to free the Commonwealth from the danger caused by the retention of an unworthy public servant" (Foster, p. 569).

It is true that for the offenses here charged the defendant could be, and should be, indicted by a grand jury, convicted by a petit, but that does not advance the contention of the defendant a single point. The Constitution itself answers any argument of such claim by saying that both methods may be had — the fact that indictment may be had does not prevent impeachment. The exact contrary is true; the remedies are concurrent. Section 6 of article 1 provides that indictment is not necessary in cases of impeachment; while section 13 of article 6 further says that a party impeached shall, notwithstanding, be liable to indictment and punishment according to law. So the defendant may be indicted and punished on conviction, but that does not answer the just position of the managers when they demand the conviction of the defendant, for both proceedings are allowed.

Consider a moment the position in which the prosecution of the crimes here charged as committed before the beginning of the defendant's official term would be placed, in proceedings by indictment by a grand jury and by a trial. The defendant is indicted, but he is, and remains, the Governor of the State, without even a suspension of the functions of his office. There is no provision by which upon indictment he becomes suspended, or his functions cease, nor at all, except in case of impeachment; nor is there any provision that I know of by which he can temporarily abdicate the functions of his office and turn them over to his lieutenant.

Then, and then only, when the Assembly has impeached, do these functions of the office pass to the Lieutenant Governor until the trial of the impeachment is concluded. Indictment of a Governor has no such effect. He stands for all purpose of the trial the Governor.

Assume, then, an indictment found and on sufficient evidence. The way that the district attorney goes about his preparation for the trial does not suit the defendant — he is too zealous — he looks too much for conviction. So he, the defendant, giving him an opportunity to be heard so as to comply with the Constitution, calmly removes his prosecutor and a more satisfactory one is substituted — one who will be more complacent to acquittal.

The judge about to hold the term where the trial is to be had is regarded as too upright and fearless. Another is assigned by the defendant to take his place. If conviction is had the question of punishment is put upon the trial judge, whose future may be made, or marred, by the man upon whom he must impose sentence. And, having been sentenced, the defendant, thereupon, issues himself a pardon.

Can such a situation be calmly considered?

It is not tolerable that such conditions should surround the only method of prosecuting a Governor for well proven crimes and our system has limited us to no such — on the contrary, it has carefully provided for just such a contingency in the provisions for the impeachment trial.

It will be answered that, if a Governor thus under indictment should remove a district attorney, or thus assign a trial judge, such acts would be impeachable, and it is true. But the mischief has then been done. He has been acquitted, has, in fact, acquitted himself on the trial of the indictment, or has pardoned himself, and so goes unwhipped of justice, which was never intended in the system.

And the closing paragraph of section 13 of article 6, "but the party impeached shall be liable to indictment and punishment according to law," is sure evidence that it was contemplated that a criminal holding office should first be impeached and convicted, and thereby stripped of his official influence and power thus to acquit himself by the methods stated, and then, standing as he

should stand before the law, as a private person, he should be tried as a private person, on indictment duly found.

One of the persuasive reasons for the establishment of a court of impeachment to meet such a case as the one at bar is found in the preamble preceding the enacting clause of what finally became section 33 of the Constitution of 1777, as adopted (the preamble was not adopted but was used in the convention), offered in the deliberations of the convention, "and in order that all delinquents, however exalted their rank and station, may be amenable to the laws," the court of impeachment should be established. (Lincoln's Constitutional History, vol. 1, p. 538.)

It is an established doctrine that the proceedings and debates contemporaneous with the adoption of a provision, constitutional or legislative, are competent, in attempting to discover the intention of such provisions. All the circumstances surrounding the birth of the provision may be considered in ascertaining its meaning.

Our highest court has thus held in *People v. Stephens*, 71 N. Y. 527, 537; *O'Brien v. Mayor*, 139 N. Y. 543, 588; *O'Brien v. Stanton*, 159 N. Y. 225, 229.

It was intended by this provision for a court of impeachment, inserted in the Constitution of the State from the very first, and continued, although not unchanged, to the present day, thereby to constitute a tribunal that would be of sufficient size, sufficient independence, sufficient in experience in public affairs and in statecraft, sufficient in dignity and independence, to insure that justice should be done to the most powerful official, when necessary to protect the State, or to safeguard its dignity, or its decency.

The defence, in resting upon the proposition that impeachment may not be had, must claim that the people have a right to elect a criminal to high office, and that, having done so, there is no relief, that such election purges the offender from the taint of crime and leaves him free to assume the role of an honorable man among honorable men.

What is the result of holding that a person guilty of, for example, perjury, who, successfully concealing his criminality, chances to be elected Governor of the State is immune from a

prosecution or proceeding to remove his baleful presence from the executive chamber and residence?

Shall it be said to students of our system of government that securing the highest office in the State purges of such loathsome crime; that the way to avoid a punishment for perjury is to be elected to high office, and that such election retains the occupant in association with decent men in high place? If so, then what is the result when, having been thus elected Governor, the individual at once, after his election, but before his inauguration, before his official term begins, commits the perjury? Surely it may not then be claimed that the election previous to the commission of the crime effects any purge of the criminal taint.

Some of the members of the Court will remember, personally, the learned Joshua M. Van Cott, long one of the very learned members of the Brooklyn bar. He was one of the counsel for the managers on the trial of Judge Barnard in 1872.

In an argument of convincing power — which I hope it will be the privilege of every member of the Court to read (Barnard's Trial, vol. 1, p. 7, *et seq.* and 220, *et seq.*) — he denies the result here contended for by the defendant and amply sustains the position of the managers.

But, truly there is little support in the precedents for any such doctrine as this, that an election to office after the commission of the crime for which impeachment is sought is condonement of such crime.

In the Barnard case the justice was impeached and convicted during his second term, upon articles charging offenses, some of them certainly not crimes at all, committed in his first.

If the doctrine of condonation invoked by the defendant has any relevancy at all here, its application would have acquitted Barnard for all offenses that were committed during his first term, because his second election, or the election of a person the second time, is just as effectual as a condonation and a purge as is his election for the first time. You can find no possible difference between the case of a man who has committed a crime during his first term of office and is elected to a second and then impeached, and the case where a man has committed a crime before any election at all.

Let us continue a little further into the possibilities of the contention of the defendant here.

When the members of the high court of last resort sitting in, and a part of, this august tribunal, come to the courtesies of the next holiday season, must they feel that they are clasping hands with a perjurer and a thief, because the admitted perjury and larceny were committed fifteen minutes before 12 o'clock noon of January 1, 1913, and therefore he cannot be impeached for their commission, whereas, if committed fifteen minutes after noon, he may be?

Must it be that every justice of our trial courts is subject to direction and appointment and assignment at the hands of a man who is subject to be justly convicted of high crime before one of them?

When, at the next regular session of the Legislature, the Senate sends its committee to notify the Governor of the State that it is convened and ready for business, must the message be taken to a criminal or one with criminal characteristics? And must such a man be permitted to send to the houses of the Legislature his views on public affairs and be allowed to approve or disapprove legislation here passed?

When it comes to the dread issue of life and death must the criminal feel that he is applying to a fellow criminal for reprieve or pardon, and, if denied, go to his doom with the just feeling that he has been judged by an unclean man — a fellow criminal with himself?

These questions are their own answer. None of these things must be, nor can. A course of reasoning that leads to any such result as necessary under our system is fallacious and based on a misconception of the genius of our institutions. He who exercises the functions of this great office must, himself, be clean — not necessarily free from fault — not blameless of every of the venial offenses that afflict our common humanity — but he must not have committed crime, nor anything in the nature of crime, that unfits him for association with the great mass of decent and God-fearing men and women over whom, for a time, he exercises authority.

And upon the correctness of this contention the people of the State may safely rest in all their future; as upon its correctness, too, they may invoke the considerate judgment of Almighty God.

It is not true then, that impeachment may not be had, and conviction, during a defendant's official term, save for criminal acts connected with the performance of official duty, or, certainly for criminal acts committed during the defendant's official term.

There have been in the papers from time to time statements that this Court has ruled against Governor Sulzer. I want to stand for the proposition here and now, at any place and at any time, that if it is at all within the power or jurisdiction of this Court, or in any way competent to brush aside every contention that stands between the Governor of the State at the present time, and his opportunity to come here and be cross-examined and make his defense, and demonstrate that he is longer a fit and clean man, it is doing to Governor Sulzer himself the greatest good that can come to him during the term for which he was elected.

The Constitution of the State makes no such limitation. "The Assembly shall have the power of impeachment, by a vote of all the members elected," is its language, granting the power in unlimited terms.

This power of impeachment in the Assembly has come down from the time of the Constitution of 1777, adopted at Kingston on April 20th of that year. Section 33 of that instrument had this language, "that the power of impeaching all officers of the State, for mal and corrupt conduct in their respective offices, be vested in the representatives of the people in the Assembly." And this, in terms, limited impeachment to official misconduct.

I shall give the authority of some great names hereafter who found under that language that impeachment might still be had for acts outside the official term, but for the purpose of this argument it is perfectly competent I think, and I am willing to admit as true, that this language of the first Constitution of 1777, which I have read, did limit the power of impeachment to official conduct or misconduct connected with the office.

This was followed by article 5, section 2 of the Constitution of 1821, in these words: "The Assembly shall have the power of impeaching all civil officers of this State for mal and corrupt conduct in office" — which was all that was given by the provisions of the instrument of 1777 and in the Constitution of

1821 was added, "and for high crimes and misdemeanors" with no limitation as to whether they, such high crimes and misdemeanors, were committed officially, or during the term of the official committing them, or prior thereto. (It should be noted here that the word "high" used in this connection means nothing. It is used for sonorous purposes, and I think for that only. Christian, in his notes to Blackstone, so says [vol. 4, p. 260]). It would have been easy to have placed the new words "and for high crimes and misdemeanors" where they would have been subject to, and been limited by, the old provision "in their respective offices," but that was not done. They were not placed before those words "in their respective offices," but after.

This language of the Constitution of 1821 continued until the Constitution of 1846, when there was a still further broadening of the power of impeachment in the Assembly by this language (article 6, section 1): "The Assembly shall have the power of impeachment by a vote of a majority of all the members elected," and precisely the same language was continued in the judiciary article reported by the convention of 1867, and adopted, although the remainder of the instrument was not adopted at the polls, as it was also continued in the Constitution of 1894, article 6, section 13, as it is today.

We have it then that the Assembly, in express terms, has had the power of impeachment ever since we have had a constitution at all, but under the Constitution of 1777 it was only to the extent, and could only be exercised against the civil officers of the State, "for mal and corrupt conduct in their respective offices;" that the Constitution of 1821 added to such mal and corrupt conduct in their respective offices the words "and for high crimes and misdemeanors" without the limitation "in their respective offices," leaving it that, although impeachable mal and corrupt conduct must still be "in their respective offices," such high crimes and misdemeanors thus added were sufficient cause for impeachment whether committed in or out of office, during the term of office of the accused, or prior thereto; while the two subsequent instruments, that of 1846 and that of 1894, as well as the judiciary article adopted in 1867, simply said, "the Assembly shall have the power of impeachment by a vote of all the mem-

bers elected," thereby leaving it that not only was it not necessary that the "high crimes and misdemeanors" should be committed in office (as it had been unnecessary since 1821) but that, thereafter, after 1846, it was unnecessary (although it had been necessary before) that the mal and corrupt conduct which was impeachable should be while holding, or in the exercise of the functions of, the office filled by the person impeached.

These changes of language thus, each time, removing limitations theretofore existing and thereby broadening the impeaching powers of the Assembly, are significant. Had it not been the intention of the people thus to broaden the powers given by the language of the previous instruments, they would have remained unchanged. The fact that there was such change of language unmistakably signifies the intention to change the power, and any examination of the changed language, the most cursory as well as the most careful, will demonstrate that the change did materially and vitally broaden this power of impeachment in the Assembly. This view is not only the only reasonable one, but it is tremendously strengthened and confirmed and demonstrated correct by the debate in the conventions where the opinions were debated and where the changes were made.

In the convention of 1821 there were distinguished names: Chancellor Kent, Van Vechten, Livingston, Wheaton, Young, Talmadge, and many others. The section on the court and the power of impeachment was debated, not briefly, but exhaustively. (Proceedings and Debates, pp. 430-40, 443-46, 646.) The Chancellor was watching the interests of the judiciary, but was entirely satisfied when it was provided that impeachment was to be had only by a majority of all the members elected to the Assembly, and conviction only by a two-thirds vote, and the question at times waxed warm as to whether greater control of the judicial branch was not required. The debate with respect to impeachment and the extent of limiting it, was not with respect to the propriety of the power of impeachment at all, but simply as to how great a number it should require to impeach. Chancellor Kent, representing the judiciary of the State, and he himself at the head of that judiciary, who believed with his whole soul in the most thorough independence of the judiciary, announced himself as

entirely content with the provision when impeachment could be had by a majority of the members of the Assembly elected and when conviction could be had by a two-thirds vote. I think it was in that convention that someone said — whether it was said there or at some other time, it is true now — that when the time comes that any officer of the State, subject to impeachment, is impeached by a majority of the elected members of the Assembly, the nearest representatives of the people in official life in the State, that when that time comes, the power for good of the officer impeached is gone, and it does not make much difference what becomes of the trial thereafter, so far as any influence on his part is concerned.

The discussion being had in the convention, whether to add to the impeaching power, as given in the Constitution of 1777, Mr. Wheaton said:

“ But it was indispensably necessary to extend it further than it was carried by the Constitution of 1777, which never sent to trial and punished public officers for official misconduct. But there might be many cases of crime which would render it wholly unfit that a public officer should remain in office, or be ever again entitled to the confidence of his country, which were entirely unconnected with official misconduct.”

If this were so in the year 1821, I ask the members of this Court how infinitely greater it is true in this year of grace 1913. With all the agitation for a closer responsibility of officials of all kinds, it is no time to limit and contract the power that exists to bring faithless officers to book. It is no time. It is no time when the Mississippi is running bank full on its way to the gulf to attack and weaken the enbankments that confine it within its borders and keep it from spreading ruin. It is no time when pestilence stalks in the land to weaken the health laws that protect the community. It is no time now, when the people are demanding, and are properly demanding, a strict, close and quick account of their officials, executive, judicial, legislative — it is no time under such circumstances for this Court, by any process, to contract the powers which it holds, nor to add to the agitation, nor to prevent the just relief which impeachment gives.

Mr. Wheaton having said that there might be many cases of

crime which would render it wholly unfit that a public officer should remain in office, or be ever again entitled to the confidence of his country, which were entirely unconnected with official misconduct, what was done? The section was then passed as amended.

The thing, then, was "not done in a corner." It was debated. It was claimed in the debate that greater power of impeachment was needed — that there might be, in his language, "many cases of crime which would render it wholly unfit that a public officer should remain in office . . . which were entirely unconnected with official misconduct;" and, thereupon, the Constitution of 1777, which they were then, in 1821, revising, containing the provision that the power of impeachment of civil officers rested in the Assembly, only "for mal and corrupt conduct in their respective offices," they voted to add to such impeachable causes, for the very reason claimed by Mr. Wheaton to be necessary — to this mal and corrupt conduct in office — the words "and for high crimes and misdemeanors," without at all saying that such crimes and misdemeanors must be connected in any way with the performance or nonperformance of public duty.

I think it is not straying too much if I digress a single minute from the printed brief, to say that the managers here want to stand broadly upon the proposition that a man may be wholly unfit to be Governor of the Empire State some little time before he is ready for state's prison. The dividing line between the two, between ripeness for state's prison and qualification for the office of Governor, is broader than the defendant claims.

No stronger evidence of the intention of the convention to do exactly what it did do can be found; and it settles beyond cavil the contention here between the managers on the one hand and the learned counsel for the defendant on the other — and settles it in favor of the contention of the managers.

In the year 1821, in Massachusetts, Judge Prescott was impeached for misconduct in office. My friend has spoken of the fact that no statute of limitations runs with respect to impeachment. If I remember the dates correctly, Judge Prescott was impeached in 1821 for offenses that were committed in 1805. Shaw, afterward the great chief justice, was of counsel for the managers. The only causes of impeachment, as then described

in the Massachusetts Constitution, were for misconduct and maladministration in office. Judge Shaw said:

“Perhaps, in this view, the commission of any heinous crime, though not immediately connected with the execution of his office, by utterly disqualifying him and rendering him incapable of performing the duties of an office requiring dignity, confidence, ability, and integrity, might reasonably be construed to be misbehavior and misconduct in office.”

You see, Judge Shaw was struggling with the proposition, advanced by the other side, that it must be for misconduct and maladministration in office under the Constitution of Massachusetts, yet he says:

“Perhaps, in this view, the commission of any heinous crime, though not immediately connected with the execution of his office, by utterly disqualifying him and rendering him incapable of performing the duties of an office requiring dignity, confidence, ability and integrity, might reasonably be construed to be misbehavior and misconduct in office. I should certainly yield with great reluctance to the position of one of the learned counsel, that the commission of an infamous offense by a judge — as perjury or forgery for instance — would not render him liable to impeachment. It would certainly be a great defect in the Constitution if a man could be brought to the bar one day, convicted of an infamous offense and sent to the pillory, and the next could assume the robes of office and sit in judgment and denounce an ignominious punishment upon a fellow criminal not more infamous than himself.”

In 1872 the judiciary committee of the Assembly of this State presented reports recommending that Judges Cardozo and Barnard, justices of the Supreme Court, be impeached — Cardozo, “for mal and corrupt conduct in office, and for high crimes and misdemeanors” — Barnard only for “mal and corrupt conduct in office.”

Samuel J. Tilden and David B. Hill were members of that committee. Hill dissented from so much of the report in the

Cardozo case as stated that impeachment should be for high crimes and misdemeanors, wishing to leave it only for mal and corrupt conduct in office. Tilden, with three other members of the committee (leaving the division of the committee five to four against Tilden's contention) dissented from the report in the Barnard case, desiring to include in the resolution the words "for high crimes and misdemeanors," instead of leaving it simply "for mal and corrupt conduct in office." These matters are not of consequence except as evidencing that the committee had considered the difference between the two causes for impeachment — mal and corrupt conduct in office on the one hand, high crimes and misdemeanors not connected with official action on the other — and that it recommended impeachment of Cardozo for both, Barnard for but the one.

The judiciary committee asked Mr. Tilden to prepare some notes on the subject of what are impeachable offenses, and, in pursuance of the request, he did prepare a complete and thorough opinion on the subject. It evidences in every part his profound thought and learning and is invaluable in any study of the subject under discussion. He was at that time a member of the Assembly and of the judiciary committee, although he was not elected one of the managers. Two years and a very few months later, he was the Governor of his State. Four years from the time he gave this opinion, he was the candidate of his party for the presidency of the United States, and there are those still living who passionately believe that he was elected to that high office. His name and his fame certainly must have weight in any court constituted as is this Court here. His conclusions were these: (Tilden's Public Writings and Speeches, edited by John Bigelow, vol. I, p. 472 et seq.)

1. Impeachment under our Federal and State Constitutions is a proceeding to remove a public officer, if cause exist. Its object is not to punish the individual, but to protect the people, even the disqualification to hold office, if added to removal, being more preventive than penal.

2. Impeachment as it existed in England has been modified here, in that

(a) Judgment may not extend beyond removal and disqualification.

(b) The party remains liable to trial and punishment in the ordinary courts—thereby separating the two elements, assigning jurisdiction of the personal crime to the ordinary courts and reserving impeachment to remove and disqualify an officer unfit to exercise the functions of the office.

3. Deducing the grounds of impeachment from the nature and objects of the procedure, while they may be called offenses, the word offense must be held, certainly in New York, to include acts which create personal unfitness for office.

4. The Constitution of 1777 described impeachable offenses as “mal and corrupt conduct in office.” That of 1821 added “and for high crimes and misdemeanors.” That of 1846 gave the power of impeachment without any words of description of cases to which it should apply. It omitted the words of definition of 1777, the more extended phraseology of 1821, and conferred the power in the broadest and most general terms. The judiciary article of 1867 continued the same words.

5. Physical disability is surely a cause of impeachment, the failure to resign in such case being a moral delinquency. Can it be doubted that a moral disability is an impeachable offense? All this yields too much to the notion that a ground of removal must be an offense. Unfitness, inability to serve the public, creates not merely a cause, but a necessity, for removal.

6. Misconduct wholly outside the functions of an office may be of such a nature as to exercise a reflected influence upon those functions and to disqualify and incapacitate an officer from usefully performing those functions. In such case the misconduct constitutes an impeachable offense and is ground for removal. The words “high crimes and misdemeanors” are not limited to official acts.

7. Mr. Tilden then adopts the definition of George Ticknor Curtis in his “History of the Constitution of the

United States" (p. 481) as follows: "The purpose of an impeachment lies wholly beyond the penalties of the statute of the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. Such a cause may be found in the fact that, either in the discharge of his office, or aside from its functions, he has violated a law or committed what is technically denominated a crime. But a cause for removal from office may exist when no offense against positive law has been committed as when the individual has, from immorality, or imbecility, or mal administration, become unfit to exercise the office."

8. He then notes and approves the language of Justice Shaw in the Prescott trial, now repeated for convenience (p. 482):

"Perhaps in this view, the commission of any heinous crime, though not immediately connected with the execution of his office, by utterly disqualifying him and rendering him incapable of performing the duties of an office requiring dignity, confidence, ability, and integrity, might reasonably be construed to be misbehavior and misconduct in office. I should certainly yield with great reluctance to the position of one of the learned counsel, that the commission of an infamous offense by a judge — as perjury or forgery for instance — would not render him liable to impeachment. It would certainly be a great defect in the Constitution if a man could be brought to the bar one day, convicted of an infamous offence and sent to the pillory, and the next could assume the robes of office and sit in judgment and denounce an ignominious punishment upon a fellow criminal not more infamous than himself."

And Mr. Tilden adds:

"The doubt which seems to exist in the mind of that great jurist arose from the words of description of impeachable offenses in the Constitution of Massachusetts, which literally relates only to acts done or omitted in office."

9. "The Constitution and laws of the State of New York have left us free from any possibility of so narrow a construction as that which Chief Justice Shaw disputed in its application to the Constitution of Massachusetts. They recognize the principle that a personal crime may create a personal disqualification to exercise the functions of a public office, although the particular offense may be totally disconnected with that office. They do not limit the range of impeachable acts, omissions, or defaults, which may work such a disqualification, to any term of office or to any time or place, but leave the whole judgment as to whether or not the disqualification is produced to the supreme and exclusive jurisdiction of the High Court of Impeachment, which is the ultimate agent of the sovereign people in their supervisory power over public officers."

In considering the question, Mr. Tilden discussed further the effect of the statutes then in force bearing on the subject. The Revised Statutes of 1830 then had a section as follows: "The Assembly has the power of impeaching all civil officers of this State for mal and corrupt conduct in office, and for high crimes and misdemeanors, but a majority of all the members elected must concur in impeachment," following exactly the language of the Constitution of 1821.

This section of the statute remained unchanged after the adoption of the Constitution of 1846. As to its effect, Mr. Tilden says:

"If the omission of the words of description made by the Constitution of 1846 and continued by the amendment of 1867, has any effect in enlarging the definition established by the Constitution of 1821, the enlarged rule would prevail over the statutory iteration of the words of the then existing Constitution."

I hope I have made this plain because it is the precise situation in which we find ourselves now.

The statute of 1830 provided for impeachment in the language of the Constitution of 1821, as it then stood in 1830. But

in 1846, the power of impeachment being greatly broadened by the Constitution of that year and left entirely to the Assembly without limitation or definition, the Legislature neglected or forgot to change the statute of 1830, but left the statutory direction with respect to impeachment precisely as it had been under the limited language of 1821, just as our friend on the other side, to whom was committed the reconciliation of the codes with the Constitution adopted in 1895, forgot or overlooked this section 12 of the Code of Criminal Procedure, and did not conform it to the language of the Constitution.

Precisely the same condition exists now, and on first consideration may seem embarrassing. It is, in fact, not at all so.

Section 12 of the present Criminal Code says:

“The Court for the Trial of Impeachments has power to try impeachments when presented by the Assembly, of all civil officers of the State except justices of the peace, justices of justices’ courts, police justices and their clerks, for wilful and corrupt misconduct in office.”

This section formed a part of the Code of Criminal Procedure when it became a law as chapter 442 of the Laws of 1881, and it has remained ever since unrepealed and unamended.

If by this section it is sought to spell out a limitation of the power of impeachment in the Assembly and which was granted to it by the Constitution of 1846, and has ever since continued in the words “The Assembly shall have the power of impeachment by a vote of all the members elected,” the answer is that it is wholly nugatory as an attempt to curtail a power of the Assembly, specifically granted to it by the Constitution in unlimited terms. Argument is not needed — curtailment of constitutional power cannot be effected by a legislative enactment. *Matter of Stilwell*, 139 N. Y. 337, 341.

The grant to the Assembly of the power of impeachment is by the Constitution and no act of the Legislature could, nor can, in any wise limit such power or jurisdiction granted by the people directly in the adoption of the Constitution, to any officer or body doing the work of the State.

I am not at all unmindful of the delightful brief prepared by Judge Vann, read here by one of the learned counsel for the defense, but it stands true that if the Legislature can impose any limitation at all on this constitutional grant of power to the Assembly, it may go to any length in limitation, although the Constitution gives the power of impeachment to the Assembly in the broadest and most comprehensive terms. If the Legislature can say that impeachment can be had only for malversation in office, then it can go to any length and say that it shall not be for any purpose other than murder. The minute we admit the contention made in the brief of Judge Vann that there can be any legislative limitation at all to the power of impeachment, that minute we give to the Legislature the right to take all the power away, or all but an insignificant portion.

It simply is true that this broad power of impeachment in the Assembly thus granted by the Constitution cannot be limited in the slightest degree by the Legislature. Not one jot or tittle of the power of the Assembly can be taken away by section 12 or by any similar enactment that the Legislature can make. Section 12 stands as though it had never been, because it is an attempt by legislative act to withdraw from the Assembly the power to impeach for any offenses except misconduct in office, while the Constitution makes no such limitation.

A step further before my conclusion: If it be said that the Assembly, by passing this section 12 of the Criminal Code in 1881, consented to a curtailment of its jurisdiction in impeachment trials and, therefore, is estopped, the perfect answer is that no power granted to an officer, or a body, by the Constitution can be limited by consent of the person or body, to whom it is granted, or otherwise. The grant of power imposes the duty of its exercise in the public service. Where a court has jurisdiction of the subject matter brought to its attention, it is not a question of discretion whether it shall exercise such jurisdiction or not, if properly invoked. It is bound to do so. Power in a public officer, or public body, is not to be exercised or the reverse at the whim of the officer. It carries with it the correlative duty of the exercise of that power in the public interest, and no waiver of such power or jurisdiction, no consent to any legislation attempting to limit

it, can in the slightest degree affect the actual existence of the power as granted by the Constitution, nor in the slightest degree affect the obligation to exercise the power when properly asked. *Mann v. Fearson*, 9 How. (U. S.) 248, 259; *Mayor v. Fargo*, 3 Hill 612; *People v. Albany*, 11 Wend. 539, 542, 543; *Phelps v. Hawley*, 52 N. Y. 23, 27; *Hagadorn v. Roux*, 72 N. Y. 583, 586.

In the language of Mr. Tilden, the enlarged rule in the Constitution prevails over the statutory iteration, in 1881, of the words of the Constitution of 1821.

Another method of reaching the same result is that section 12 of the Criminal Code thus passed in 1881 was repealed by the adoption of the present Constitution in 1895, again giving to the Assembly the unlimited power of impeachment in the same language as of the Constitution of 1846 and the judiciary article of 1867. The adoption of the Constitution of 1895 operated as the repeal of such section 12—a repeal of a higher body and certainly as effectual as though such a repeal had been by the Legislature itself passing a repealing act.

Mr. Tilden based something of argument upon the statutes of 1830. If deemed of consequence it will be found that section 30 of the present public officers law is the same as the law of 1831.

It comes then that this opinion of Mr. Tilden, statesman that he was, a man of the broadest views as well as a most eminent lawyer, that the position from which he spelled his conclusions existed in 1872 precisely as the conditions exist now, and the conclusions that he reached there are compelling in favor of the contention of the managers here. We have then no embarrassment whatever over the existence of section 12 of the Criminal Code. The questions under consideration are to be settled in precisely the same way as though it had never been passed.

It is, however, now claimed by the learned counsel for the defendant that section 7 of article 10 affects the situation, justifies this section 12 of the Criminal Code as constitutional and defeats this, our, contention. The section thus invoked reads as follows:

“Provision shall be made by law for the removal for misconduct or malversation in office of all officials, except ju-

ditional, whose powers and duties are not local or legislative, and who shall be elected, at general elections and also for supplying vacancies created by such removal."

This section first came into the organic law as section 7 of article 10 of the Constitution of 1846, and has since remained without change.

The process of reasoning that seeks to give this section any applicability to the question under argument is obscure; how it may be used to justify any limitations of the unlimited power of impeachment granted to the Assembly by the Constitution, is not at all apparent. The language of the section and its physical position in the organic instrument, alike, evidence its nonapplicability to any phase of impeachment proceedings or of the power of impeachment.

We have seen that impeachment and impeachment trials are governed by article 6, section 13, article 6 being the one on the judiciary, where provisions for impeachment are properly and naturally placed.

The subjects of the Executive and his power are treated in article 4, the other State officers, except the judiciary, by article 5, the judiciary by the various sections of article 6. Article 7 covers the matter of State credit, power to contract debts, the sinking fund, etc.; article 8 relates to corporations, commissions and boards; article 9 to schools, and then comes article 10, in which the section under discussion is found. It begins by treating the subject of county officers, sheriffs, clerks, district attorneys and the like (article 10, section 1). Section 2 provides for the appointment or election of county and lesser officers; section 3 relates to the duration of term of officers, where such term is not provided for by the Constitution; section 4 provides that "The time of electing all officers named in this article shall be prescribed by law;" section 5 treats of the filling of vacancies; section 6 defines the political year and then comes this section 7 before quoted in full.

The Constitution has come down in this article, away from the offices of Governor, Lieutenant Governor, judges and legislators, and is here treating the subject of officers of lower rank. If the

defendant's counsel are right, this continuous diminuendo suddenly ceases, and we at once have the tremendous crescendo of a return to the power of impeachment, which, as mere arrangement, would be grotesque.

The section refers to inferior officers, other than judicial, inferior to Governor and Lieutenant Governor, and provides that their removal may be provided for by law. The Constitution, deeming it beneath its dignity to treat of such lesser subjects, it is remitted to the Legislature to provide by law for such removal. And this contention is enforced by the fact that the Legislature has provided by law for such removal of such lesser officers, but nowhere for the removal of Governor or Lieutenant Governor (public officers law, sections 32-36).

Section 32 of the public officers law provides that the Secretary of State, Comptroller, Treasurer, Attorney General, or State Engineer and Surveyor, may be removed by the Senate, on the recommendation of the Governor, for misconduct or malversation in office, if two-thirds of all the members elected to the Senate shall concur therein.

Section 33 takes care of the cases of removal by the Governor, of officers appointed by him to fill vacancies in minor places.

Section 34 allows the taking of testimony in removal cases, while 35 relates to mere procedure and 36 to removal of town and village officers by the court.

This practical construction by the Legislature, by the various revisers and codifiers of the statute, nowhere saying a syllable about removal of the Governor or Lieutenant Governor, nowhere here mentioning impeachment, either its power, or its proceeding, is some — slight perhaps, but still some — evidence of construction of this constitutional section.

But that this article 10 does not, in any part, refer to, or affect, the office of Governor and Lieutenant Governor is demonstrated beyond challenge by the language of section 4 of the article, before quoted: "The time of electing all officers named in this article shall be prescribed by law." The time of electing the Governor and Lieutenant Governor is fixed by article 6, section 3 as the same time when members of Assembly are chosen, which

is (article 3, section 9) the Tuesday succeeding the first Monday in November, until otherwise directed by the Legislature.

When, therefore, section 4 of article 10 remits to the Legislature the power to prescribe the time of electing all officers "named in this article," the officers named in the article are other than those the time of whose election is fixed by the Constitution in its other parts.

The contention of the defendant, however, still is that this article 10, section 7, gives to the Legislature the power to enact section 12 of the Criminal Code, and renders it forceful and not obnoxious to the Constitution. The language does not purport to limit in any way the general grant of the power of impeachment given to the Assembly by section 13, article 6. As to judicial officers, by the Constitution itself is given:

(a) The power of impeachment (article 6, section 13);

(b) Removal by both houses by a two-thirds vote of each house (article 6, section 1).

This power of removal of judges under this constitutional provision in no way limits or affects the power to impeach them. The proceedings are concurrent. If this be so — if a constitutional power to remove does not affect impeachment proceedings — how can a legislative power of removal have any effect on impeachment proceedings? Twice within the decade the power of removal of a justice of the Supreme Court has been invoked in the Legislature, but no counsel, the most zealous, has ever claimed in brief or argument, that such power of removal precluded or limited the power of impeachment.

It stands true, then, that as to the judiciary, by the Constitution itself, we have both the power of impeachment and the power of removal; as to all other officers except members of the Legislature who are taken care of by the power of expulsion, the power of impeachment is given by the Constitution and, as to all such other officers but the Governor and Lieutenant Governor, the right to enact laws for their removal is given to the Legislature, and it has acted under this power. But nowhere may the Legislature limit, in any way, the right given to the Assembly in broadest phrase, to impeach any officer, executive or judicial, for any reason it sees fit.

We have thus far argued for the power of impeachment in the Assembly and the right of conviction in the court of impeachment, first, upon the general doctrine applicable anywhere in the Republic, and second, upon the proper construction of our State Constitution.

There is another line of reasoning that reaches the same result and, at the same time, accentuates and confirms the previous argument.

The argument has proceeded upon the concession (although for the argument only) that the crimes here charged against the defendant were committed not only outside the day of his term of office, but totally disconnected therefrom. But no such lack of connection exists; on the contrary, the crimes charged are immediately and vitally connected with the defendant's official term — so vitally connected that it is no violence of speech to say that they were official acts and must be so treated here.

The election law (chapter 22 of the Consolidated Laws), passed in 1909, which codified the various corrupt practices acts up to that time, and which was amended by chapter 891 of the Laws of 1911, has imposed new duties upon one running for office, has created new relations between a candidate for office and official duty when office is finally assumed — relations so close and so well defined as to render any ancient precedents on the subject, whether crimes committed prior to the official term are impeachable or not, largely obsolete. A detailed examination of the provisions of this election law is not necessary. It is sufficient to say that among other things it is designed to control the expenditure of funds, and generally to prescribe the duties of candidates and of those in charge of the selection of nominees and the election of candidates.

Of the laws in force at the time of the general election in 1912, immediately affecting the question here discussed, were sections 546 of the election law and 776 of the Penal Law.

The first, that of the election law, requires to be filed within twenty days after election a statement setting forth all the receipts, expenditures, disbursements and liabilities of a committee and of every officer, member and other person in its behalf, which shall include the amount received, the name of person or committee from whom received, the date of its receipt, the amount of every ex-

penditure or disbursement exceeding five dollars, the name of the person or committee to whom it was made, and the date thereof and, except where made to another committee, the purpose of the expenditure or disbursement.

A candidate is required to file the same statement and, in addition, all contributions made by him.

The latter (section 776 of the Penal Law) requires to be filed a statement by a candidate within ten days after election, showing in detail all the moneys contributed or expended by the candidate, directly or indirectly, by himself or through any other person, in aid of his election. It requires that there shall be given the names of the various persons who received the moneys, the specific nature of each item and the purpose for which it is expended, or contributed. To this there must be attached an affidavit, subscribed and sworn to by such candidate, setting forth that the statement is in all respects true and a full and detailed statement of all moneys contributed or expended by him, directly or indirectly by himself or through any other person in aid of his election.

It will thus be seen that from the time a person is nominated for office he comes under the provisions and directions of the law. He is not yet an officer, but he is seeking to become one and, in order to become one, is required to conform to these directions of the statute.

There has thus been prefixed to the office what we may call an official vestibule, so placed that a person entering into the office must pass through it. And it is no stretch of language to say that the law practically makes an officer of a candidate — and of an officer-elect. He is certainly subject to the direction of the law from the moment he is nominated.

The object of all this is patent. Misconduct as a candidate corrupts public duty in office. Wickedness in a candidate is as surely inherited by the official as any hereditary taint by the child from the parent.

The title to one of the acts leading up to the present law expresses it fully — “An act to amend the election law in relation to the publicity of contributions to, and expenditures of, campaign funds, and providing for judicial inquiries thereto.” (Chap-

ter 502, Laws 1906.) The purpose of the statute is not captious. It is genuine and for the purpose of affording positive information to all interested, to the people at large, not only how much and for what the candidate himself has contributed, but the persons who have made contributions to him, so that there may be no misunderstanding either as to the amount of contributions thus made, or the character of those who made them. It was intended that the people should have this information, so that, among other things, during the administration of the office, it could be observed whether there was any attempt being made to reward by official patronage, or appointment, those who had made undue contributions in aid of the election of the official dispensing such patronage.

While the act of filing the statement of expenses is required to be done before the official takes his office, its purpose is to insure pure conduct in the preliminary struggle for the office, and it has become a matter of the deepest concern to all the people of the State that the various candidates shall comply with this provision, fully and completely. Not once since this policy embodied in the corrupt practices acts has been entered upon, has there been any variableness or shadow of turning, with respect to it. Every step in legislation has been to strengthen and complete the scheme and to make stronger its provisions. It was attempted to make forfeiture of office one of the results of failing to file a statement as prescribed by law, but this was held unconstitutional, as creating an extra constitutional test for office. (Saxe on Elections, p. 174, and cases there cited.)

The charge here made (among others), is that the defendant, William Sulzer, made and filed a grossly false statement under these provisions of the statute, and then corruptly swore that it was true. The statement thus filed showed receipts by the defendant from sixty-eight contributors to the amount of \$5,460 and expenditures aggregating \$7,724.09. It is charged that contributions enumerated in the article, to the amount of \$8,500, were made to the candidate and not reported.

By this corrupt practices legislation, the position of a candidate is legally, indissolubly linked with that of the official. It is as much required that he shall make this statement of the amounts

received by him and the expenditures, as it is required that he shall take the official oath as Governor, when inaugurated. The one cannot be separated from the other, and one is as positive a direction as is the other. The making of a false statement of receipts and expenditures, is just as much a violation of duty and the commission of a crime, as is the violation of the official oath taken upon induction into office.

It comes then, instead of the candidate being required to take but an oath before he enters upon the duties of his office, he is required to make this certificate during the inchoate period, just after he has been voted for as a candidate, and to take the oath when he assumes the duties of the office. The falsity of statement of receipts and expenditures is as surely a violation of official duty, not perhaps as noxious in its effect and yet in view of the purposes of the statute scarcely less so, and just as much scandalizes the State and is just as much evidence of moral unfitness for the office, as the violation of the inaugural oath taken at the beginning of the term. He who deliberately fills out a false statement in November is not fitted, nor fit, for public office in January; he who commits larceny in October may not be intrusted with the responsibilities of high office three months later.

Where is the harm that can come to the State from the violation of the oath of office that does not come from a false certificate as to what has been done while a candidate for office — where the shame in the one case, that does not follow in the other? Indeed, the falsity of the certificate as to the receipts and expenditures is the more precisely provable and the more precisely wrong than is the violation of the official oath, because it relates to specific and absolute facts, while the violation of the official oath may have something of difference of opinion as to what constitutes official duty in a given case, in its defense. But there can be no possible defense or palliation of the act of suppressing contributions and expenditures or in making a false affidavit as to them.

In all this there is nothing of effort to convict the defendant for lying. The world hates a liar, but it is not for lying that we ask conviction of William Sulzer. In pursuance of the imperative directions of the statute — a statute based on the soundest

reasons — he is charged with filing a false certificate of contributions made to him. In doing so he violated the law and committed a crime. Appended to this false statement, thus filed, is an affidavit, duly sworn to before a magistrate, attesting to the correctness of the statement. Argument is not here had as to whether the crime of perjury may be predicated upon this false affidavit. It is had on another phase of the case, by another counsel who will succeed me. But, whether guilty of legal perjury, or whether, on a quibble that finds its congenial atmosphere at the Old Bailey, or the Tombs Police Court, he shall escape judgment of that loathsome crime, he intended to commit perjury and believed that he was committing it, in subscribing this oath. All the blackness of heart; all the intention to do wrong; all the revelation of infamous character, that are demonstrated by a legally false oath, are demonstrated by this intention to commit perjury, as too, by the certificate itself, the violation of the statute designed to prevent corruption at the polls.

It may be urged that the statute creates no penalty of forfeiture of office, for a false certificate of receipts and expenditures, during the candidacy of the person making the oath. It is true. But, as before seen, it attempted to do so, but was declared impossible under the Constitution. If it could, no impeachment would, perhaps, be necessary. We are not here arguing any question of automatic removal, but the question of what is an impeachable offense.

To repeat, varying the phrase very slightly — no man may now legally become Governor of the Empire State, unless and until he shall have done two things: one, certified to his receipts and expenditures while a candidate, and appended thereto his affidavit that it is correct; the other, the oath he takes upon his inauguration, the instant that he becomes the highest official of the State. Both are connected with his office, one as much as the other; both precede his actual investment with the powers and duties of the position, the one by a few weeks, the other by a single instant.

A person making a false certificate of contributions and expenses is guilty of a misdemeanor (Penal Law, sec. 776), for the filing of a false statement is, of course, not a compliance with

section 776 which requires the filing of a true one, which has not been done.

Will it be claimed by the learned counsel for the defense that, if it were clearly alleged and proved here that the defendant were guilty of the crime of bribery in the purchase of votes at the election where he was chosen, it would not be an impeachable offense because the crime was committed before the beginning of the official term? I cannot think that they will make any such contention. If they do, I suspect that they will be without the support of a single member of the Court. Yet bribery is not mentioned in the Constitution as an impeachable offense, and, if it is such, it is only under the general grant of the power of impeachment, without attempt at definition, only as a high crime and misdemeanor, and if it is so guilty and impeachable, as of course it is and must be, it is for a crime committed before the official term began, is something done as an individual, not any act as Governor, nor any malversation in office, nor for misconduct in office. How may an official be impeached for bribery committed before his term began, but connected with his election to the office held, and not be impeached for evasion of the statute as to filing a certificate of receipts and expenditures connected with his election? Bribery at the election is not mentioned as a cause of impeachment, neither is a false certificate as to election expenses. Either, if impeachable at all, must be because of the commission of a crime. Both are done in connection with the election to the very office held and one is as corrupting to the party doing it, as much an evidence of the moral unfitness that disqualifies the offender from continuing to hold his office, and is as truly impeachable, as the other.

All the cases of expulsion from a legislative body for bribery in obtaining election to the office are applicable here. Expulsion from a legislative office for bribery is but the equivalent of impeachment of an executive or judicial officer for the same offense. Impeachment of a legislative member is not a proper method of procedure, and so far as counsel have discovered was done only in the Blount case in the early part of the last century — never in this country before or since. The Lorimer case, fresh in the minds of all, is the latest, where expulsion was had for such cause. In that case,

in all cases where action has been had for bribery in securing the office, the offense has been committed, of course, and of necessity, before the official term began.

It stands true, then, that in the State of New York the offenses here charged are impeachable; that, if proven, they show a moral unfitness to fill the office of Governor, or any office, and the defendant's contention with respect to the nature and effect of the crimes charged must be overruled.

APPENDIX

(Accompanying Mr. Brackett's argument)

Federal impeachments

WILLIAM BLOUNT, *Senator from Tennessee.*

Impeached July 7, 1798, for conspiring while a senator to conduct hostile expedition against Spain in the Floridas and Louisiana, in order to conquer same for Great Britain. Also for exciting and encouraging Creek and Cherokee Indians to begin hostilities in the Floridas and Louisiana for the same purpose — all in violation of treaty between United States and Spain. Blount filed a plea to the jurisdiction on ground that he was not then a senator, and was not then, or at the time of the offenses charged, a civil officer of the United States. (He had been expelled by the Senate before his impeachment.)

Plea sustained 14 to 11 and Blount acquitted; the result of this ruling being that none but a civil officer can be impeached.

Managers included Messrs. James A. Bayard and Robert G. Harper, Samuel W. Dana, Dennis, Evans, Gordon, Hosmer, Pinckney, Sewal, Imlay and Kittera.

Respondent's counsel.— Jared Ingersoll and A. J. Dallas.

JOHN PICKERING, *United States District Judge, N. H.*

Impeached February, 1803, for delivering ship *Eliza* to claimant after attachment, without requiring bond as provided by law; refusing to hear testimony offered by district attorney on behalf of United States; refusing to allow an appeal from his judgment; drunkenness on bench and using profane language.

Pickering did not appear; but his son, through Robert Harper as counsel, filed a petition that Pickering was insane and asked

more time. Denied. Trial proceeded, Pickering being absent and not represented.

Guilty 19 to 7 on each article.

Sentenced to removal from office.

Managers.—Messrs. Nicholson, Early, Rodney, Eustis, John Randolph, jr., Samuel L. Mitchell, George W. Campbell, Blackledge, Boyle, Joseph Clay, and Newton.

SAMUEL CHASE, *Justice Supreme Court, United States.*

Impeached March, 1804, for misconduct on trials of John Fries for treason, and James T. Callender for sedition; an improper attempt to induce a grand jury to find an indictment against a certain newspaper; and for delivering a political harangue to a grand jury in Maryland and other misconduct in office.

Chase answered at length, admitting many facts; but explaining them by able argument.

Acquitted.—Highest vote against him, 19–15.

Aaron Burr, Vice President, presided at trial.

Managers.—John Randolph, Joseph Nicholson, Rodney, Early, Boyle, Nelson, and G. W. Campbell.

Respondent's counsel.—Luther R. Martin, R. G. Harper, Joseph Hopkinson, and Philip B. Key.

JAMES H. PECK, *Judge United States District Court, Missouri.*

Impeached in April, 1830, for punishing Luke Edward Lawless for contempt, because he published a letter pointing out errors in one of Judge Peck's decisions regarding a Spanish land claim. Peck answered, justifying his act.

Acquitted.—22 guilty; 21 not guilty.

Managers.—James Buchanan, Henry R. Storrs, Ambrose Spencer, George McDuffie and Charles A. Wickliffe.

Respondent's counsel.—William Wirt and Jonathan Meredith.

WEST H. HUMPHREYS, *United States District Judge, Tennessee.*

Impeached May, 1862, for accepting and discharging duties of judge under Confederacy without resigning as United States judge, and other treasonable acts. Humphreys did not appear. Tried as if plea of "not guilty" had been entered.

Convicted, and sentenced to removal and disqualification to hold an office by unanimous vote.

Managers.—Bingham, Pendleton, Trin and Dunlap.

ANDREW JOHNSON, *President of United States*.

Impeached, February 24, 1868, for removing Stanton as Secretary of War in violation of tenure of office act, and an act to define certain conspiracies; for making speeches contemptuous of Congress.

Johnson answered raising legal questions only. Chief Justice Chase presided. Trial occupied from March 30 to May 6, 1868.

Acquitted.—35 guilty, 19 not guilty.

Managers.—Benjamin F. Butler, Thaddeus Stevens, John A. Bingham, George S. Boutell, James F. Wilson, Thomas Williams and John A. Logan.

Respondent's counsel.—Henry Stanbery, Benjamin R. Curtis, William M. Evarts, William S. Groesbeck and Thomas A. R. Nelson.

WILLIAM W. BELKNAP, *Secretary of War*.

Impeached, 1876, for bribery, receiving \$6,000 to \$12,000 a year from post-trader appointed by him.

Belknap resigned and President Grant accepted his resignation. Immediately thereafter, and on the same day, he was impeached.

Plea was filed to jurisdiction upon ground that Belknap was not an officer of United States when impeached.

Overruled by vote of majority, but less than two-thirds.

Counsel for Belknap refused to plead further and trial proceeded as if Belknap had pleaded "not guilty."

Acquitted.

Managers.—Scott Lord, J. Proctor Knott, W. T. Lynde, John A. McMahon, Eldridge G. Lapham, George F. Hoar, Jenks.

Respondent's counsel.—Matthew H. Carpenter, Jeremiah S. Black and Montgomery H. Blair.

CHARLES SWAYNE, *Judge United States District Court, Florida*.

Impeached December, 1904, for claiming and receiving \$10 a day for expenses while holding court outside his district;

for not residing in his district; for abuse of judicial power by causing a receiver of railroad, appointed by him, to furnish him with free transportation, private car, etc., for unlawfully adjudging certain lawyers in contempt of court.

Swayne answered.

Acquitted.

Managers.—Messrs. Palmer, Jenkins, Gillet, Clayton and Smith.

Respondents' counsel.—Anthony Higgins and John M. Thurston.

ROBERT W. ARCHBALD, *Judge United States Commerce Court.*

Impeached 1912, for unlawfully, and through his influence as a judge, making contracts and obtaining options, valuable to him, from railroad companies and others, who were litigants before him; for accepting presents of money, from lawyers and litigants to pay his expenses on a pleasure trip; for appointing as commissioner of jurors, a general attorney for a railroad company.

Archbald answered.

Convicted, removed, and disqualified.

Managers.—Henry D. Clayton, Edwin Y. Webb, John C. Floyd, John W. Davis, John A. Sterling, Paul Howland and George W. Norris.

Respondent's counsel.—R. W. Archbald, Jr., A. P. Worthington, M. J. Martin and Alexander Simpson.

State impeachment

ARKANSAS

POWELL CLAYTON, *Governor of Arkansas.*

Impeached, 1871, for conspiring with members of the state Supreme Court to unlawfully deprive Lieutenant Governor James W. Johnson of his office, to which he had been elected and for which he had duly qualified; for unlawfully removing a county probate judge; for aiding in frauds in the election of members of the state legislature; for accepting bribes, etc.

At the same time a resolution was passed, suspending Clayton from performance of his duties as Governor, and the members of

the House of Representatives by force locked him into the executive chamber and nailed the door, in order that he might not escape and act. The next day he notified the Assembly that he was advised by counsel that the Assembly had no power to suspend him from office.

The next day after the impeachment of Governor Clayton the House of Representatives adopted a resolution of impeachment against John McClure, chief justice of the state, for engaging in the conspiracy with the Governor above mentioned.

As soon as a quorum of the Senate was present, articles of impeachment against the Governor and chief justice were presented.

Other state officers were impeached about the same time.

The Senate thereupon adopted rules for impeachment, which forbade the managers from arguing any preliminary or interlocutory question during the trial for more than ten minutes, and otherwise restricting the managers. Thereupon, the managers reported to the House that in their opinion no fair or impartial trial could be had. The report was accepted and the managers discharged, and the speaker of the House authorized to appoint another board of managers, which was done. The new managers then reported that they were unable to find sufficient evidence which would warrant the preparation of particular articles of impeachment against the Governor, and requested that they be discharged. The House thereupon resolved "that further proceedings in the impeachment of Powell Clayton be dispensed with, and that the action of this House heretofore taken, be set aside and cancelled; that the Senate be informed of the action of this House in the premises, by the clerk of the House, and that the committee of the board of managers be discharged."

On the same day Governor Clayton sent the Senate a message, declining to accept the position of United States Senator.

A single article of impeachment was presented against Chief Justice McClure for unlawfully issuing an order restraining James M. Johnson, as Lieutenant Governor, from exercising the duties of the office of governor during the period above mentioned.

A compromise was arranged under which Johnson resigned and was appointed Secretary of State. Governor Clayton was re-elected to the Senate of the United States and accepted the office.

A special chief justice was appointed by the Governor to preside on the trial of Chief Justice McClure, who filed a demurrer to the articles upon the ground that although he was charged with unlawfully issuing an order it was not alleged that he did it with corrupt motive. The demurrer was unanimously sustained.

CALIFORNIA

WILLIAM R. TURNER, *Judge of the Eighth Judicial District.*

Impeached in 1851, for committing Stephen J. Field for contempt of court to an imprisonment for forty-eight hours and a fine of \$500, and his disbarment for taking legal steps to set aside the contempt proceedings, and the similar treatment of two other members of the bar who assisted him in the matter. Mr. Fields was released by habeas corpus immediately after his arrest, but Judge Turner had him arrested again, threatening with commitment the judge who granted the writ, and after the attorneys had been restored to the bar by a mandamus from a higher court, attempted again to disbar them. The matter was compromised by a passage of a law, redividing the state into judicial districts, and assigning Judge Turner to another part of the state.

He subsequently resigned to avoid an impeachment for habitual drunkenness and other charges.

HENRY BATES, *State Treasurer.*

Impeached 1857, for conspiracy to defraud the State through loans and deposits of the state's funds, and other official misconduct.

The respondent pleaded to the jurisdiction of the court in his answer, which alleged that his resignation had been accepted by the Governor, and that he was no longer in office when the articles were adopted by the Assembly.

The managers filed a replication which alleged that the respondent was treasurer of the state at the time of the impeachment; that if he had been indicted, the indictment was found after the articles had been presented. To this Bates filed a plea which claimed that the allegations in his answer, which were not

denied by the replication, were sufficient to show that the court had no jurisdiction. The Senate overruled the objection to the jurisdiction and ordered a further answer, which the respondent refused to make.

Convicted, removed from office and disqualified in a judgment which recited the fact that he had resigned after his impeachment.

JAMES H. HARDY, *Judge of the Sixteenth Judicial District.*

Impeached 1862, for wilfully and wrongfully making decisions for the benefit of his friends in civil and criminal suits pending before him; for drunkenness upon the bench and other misconduct in office.

He was convicted by a two-thirds vote, under the fifteenth article of impeachment, which charged him with profane language out of court, expression of sympathy with secession, Jefferson Davis and the Confederacy.

Sentenced to removal from office.

FLORIDA

HARRISON REED, *Governor.*

Impeached 1868, for lying while transacting business with members of the Legislature; for giving commissions to officers in blank; and for embezzlement.

The articles of impeachment were presented to the Senate in the presence of only eight senators, twenty-four being the entire number of the Senate when full, but several elected being disqualified by the acceptance of inconsistent offices, and vacancies existing also through resignation, so that eight was a majority of the number of senators in office. By the state Constitution on impeachment of the Governor, he was suspended from office until the end of the trial. Immediately, the Lieutenant Governor issued a proclamation that he was acting Governor. Governor Reed refused to surrender possession of his office and requested an opinion of the Supreme Court on the question of whether a quorum of the Senate had been present when the impeachment was presented, and whether the proceedings had the effect of suspending him from office. The Lieutenant Governor wrote to the

court, claiming that it ought not to give a legal opinion upon the questions which were within the exclusive jurisdiction of the Senate and Assembly. The court held unanimously that no quorum of the Senate was present when the impeachment was presented, and, consequently, Governor Reed had not been suspended from office.

In the Matter of the Executive Communication of the 9th of November, 1868, 12 Florida, 653.

In the meantime the Legislature had adjourned, and when it reconvened, both houses recognized Governor Reed in office, and the impeachment was abandoned.

GEORGIA

HENRY OSBORNE, *Judge Superior Court, Camden County.*

Impeached 1791, for falsification of election returns.

Convicted, removed and disqualified for thirty years, and fined \$600 to defray expenses of impeachment.

JOHN LOVING, SAMUEL JACKSON and FLEMING F. ADRIAN,
Commissioners of Fraction Sales.

Impeached 1825, for retention of moneys collected by them as cash payments for sales of fractional parts of surveys; for withholding large number of state grants so that they might execute complete titles to the purchasers of said fractional surveys, and for the mutilation of records, etc.

Acquitted.

WASHINGTON L. GOLDSMITH, *Comptroller General.*

Impeached 1879, for the collection of illegal fees; for making false returns, and converting to his own use moneys collected as insurance taxes and fees which belonged to the state, etc.

Demurrer to several articles, which was sustained as to one and overruled as to all the others.

Court permitted evidence of offenses charged in articles which were committed during a term of the same office preceding that then held by the respondent.

Convicted, removed and disqualified.

JOHN W. RENFROE, *State Treasurer.*

Impeached 1879, for corruptly receiving commissions from banks in return for depositing with them state funds.

Acquitted.

ILLINOIS

THEOPHILUS W. SMITH, *Justice of the Supreme Court.*

Impeached 1833, for permitting his son, then a minor, to bargain off the office of clerk of the Circuit Court of Madison county, and to hire another to do the work thereof at \$25 a month, reserving the fees of said office to himself. For committing a Quaker to jail and certifying that he was incompetent to serve as a juror, by reason of want of soundness of mind, because he presented himself to the court with his hat on, and other improper conduct in office.

Acquitted.

IOWA

JOHN L. BROWN, *Auditor of the State.*

Impeached 1886, for failure to keep proper accounts and to make reports of office; for bribery and for other misconduct in office.

Acquitted.

KANSAS

CHARLES ROBINSON, *Governor.*

Impeached 1862, for complicity in the sale of bonds of the state of Kansas, par value \$56,000, to the United States, at 85 per cent upon their amount, of which the state received only 60 per cent, the remainder being retained by one Stevens, a leading Kansas politician, who made the sale of the bonds.

Acquitted upon the ground that there was no evidence of his complicity in the act.

JOHN W. ROBINSON, *Secretary of State* and GEORGE S. HILYER, *State Auditor.*

Impeached in 1862 for their complicity in the bond transaction above described. Each of them was convicted and removed from office.

THEODOSIUS BOTKIN, *Judge of the Thirty-second Judicial District.*

Impeached 1891, for habitual drunkenness both on and off the bench, and for other misconduct in office.

Demurrers were sustained to the articles, which charged drunkenness when not engaged in discharge of his official duties; the illegal purchase of intoxicating liquors and the frequenting of places where he knew that liquor was illegally sold.

Acquitted.

The case is interesting as giving a view of the state of civilization in Kansas at that time.

LOUISIANA

BENJAMIN ELLIOTT, *Judge of the City Court, City of Lafayette.*

Impeached 1844, for failing to keep records of the naturalization of aliens, and for permitting his clerk to issue false certificates of naturalization.

Convicted and removed from office.

GEORGE M. WICKCLIFFE, *Auditor of Public Accounts.*

Impeached 1870, for bribery and incompetence.

Convicted, removed and disqualified.

HENRY C. WARMOTH, *Governor.*

Impeached 1872, for forcibly expelling from office the Secretary of State and the issuing of a commission to another in his place. For the unlawful appointment, after the adjournment of the Senate, of an Attorney General and judge and other officers. For the offer of a bribe of \$50,000 to the Lieutenant Governor, etc.

Respondent appeared by counsel and filed exceptions, disputing the legality of the court and the lower house, on the ground that they were not lawful bodies. The court rejected these and refused to permit them to be filed. Before any further proceedings the Senate requested the advice of the chief justice, whether the trial should proceed after the respondent's term of office had expired.

Chief Justice Ludeling delivered an opinion that it could not, saying: "I question the policy of kicking a dead lion." The Senate adopted this opinion and adjourned.

MASSACHUSETTS

WILLIAM GREENLEAF, *Sheriff of Worcester County.*

Impeached 1788, for converting public money to his own use.
Demurred and pleaded not guilty.
Convicted and removed from office.

N. HUNT, *Justice of the Peace.*

Impeached 1794, for making false record entries.
Pleaded not guilty.
Convicted and suspended for one year.

JOHN VINAL, *Justice of the Peace.*

Impeached 1800, for bribery, etc.
Pleaded not guilty.
Convicted, removed and disqualified.

MOSES COPELAND, *Justice of the Peace.*

Impeached 1807, for entering judgments in the name of a fictitious endorsee upon promissory notes owned by him. For taking judgments in cases before hour of return of summons and refusing to vacate judgments, and for accepting a bribe of \$1.50.
Acquitted.

JAMES PRESCOTT, *Judge of Probate County Court of Middlesex.*

Impeached 1821, for extortion in collection of exorbitant fees in excess of amount authorized by statute. Fifteen articles in all, and he was acquitted on all except two.
Convicted and removed.

Among respondents' counsel were Samuel Hoar and Daniel Webster.

SAMUEL BLAGGE, *Justice of the Peace.*

Impeached 1826, for making false certificates that negroes and Indians had appeared before him and declared that they were free and resided in free states.
Acquitted.

MICHIGAN

CHARLES A. EDMONDS, *Commissioner of the State Land Office.*

Impeached 1872, for corruptly withholding land for sale for the benefit of certain land dealers, in return for moneys paid to himself and deputies and clerks; for furnishing secret information concerning such lands to land dealers, whose profits he shared, and for other corrupt conduct in office. And for depositing in the post office of the United States in the state of Indiana an obscene newspaper and circulating such newspaper in the state of Michigan, and for other immoral personal conduct.

Acquitted.

Defended by John B. Shipman.

MINNESOTA

WILLIAM SEEGER, *State Treasurer.*

Impeached 1873, for concealment of delinquencies of his predecessor in office and loaning state funds to private individuals, some of them his bondsmen.

Seeger resigned, and the Governor accepted his resignation, but the Senate voted twenty-six ayes and ten nays that they would receive no evidence concerning such resignation. Seeger's counsel then filed a plea of guilty with a disclaimer of corrupt motives. The Senate thereupon found him guilty and sentenced him to removal from office.

SHERMAN PAGE, *Judge of the Tenth Judicial District.*

Impeached 1878, for maliciously adjourning for four years a trial of an indictment for libel against him, pending the adjournment holding the accuser under heavy bail; for refusing to make orders fixing the number of deputies for the sheriff; for nonattendance upon terms of court, and for preventing the payment of such deputies; for maliciously attempting to induce a grand jury to indict a county treasurer who had committed no crime, and for other improper conduct in office.

Acquitted.

Managers were ordered to furnish a bill of particulars as to

certain articles which the respondent moved to quash because too indefinite.

E. ST. JULIEN COX, *Judge Ninth Judicial District.*

Impeached in 1881, for drunkenness in discharge of his official duties.

Convicted.

Managers were ordered by court to secure bill of particulars as to certain articles to which the respondent had demurred because too indefinite.

MISSOURI

RICHARD S. THOMAS, *Circuit Judge.*

Impeached 1826, for refusing to recognize the rightful clerk of his court; for putting his own son in the place of the clerk, and for other improper conduct in office.

Convicted.

ALBERT JACKSON, *Circuit Judge.*

Impeached in 1859, for insulting, abusive and tyrannical conduct toward parties and counsel; for imposing illegal imprisonments and refusing writ of habeas corpus, and other improper conduct in office.

Acquitted.

James Proctor Knott was one of the managers on this trial. Judge Jackson defended in person.

PHILANDER LUCAS, *Judge Fifth Judicial Circuit.*

Impeached 1872, for certifying bills of costs in blank against a county in his circuit, and for other improper conduct in office.

Respondent answered and defended. Articles were withdrawn at the conclusion of the evidence offered in their support.

MISSISSIPPI

ALBERT AMES, *Governor.*

Impeached 1876, for failure and refusal to comply with a request of the county treasurer to suspend a sheriff and tax collector, who had failed and refused to make reports and payments

of taxes collected; for the appointment of justice of the peace and constables for partisan purposes; for permitting the State Treasurer to remain in office and in possession of the treasury after the state Attorney General had notified the Governor that his bond was insufficient. For defrauding the State of \$43,750 by granting contracts without competitive bidding, etc.

Governor Ames wrote to the Legislature that he would resign if the impeachment proceedings were dismissed. The articles of impeachment were withdrawn and he resigned.

ALEXANDER K. DAVIS, *Lieutenant Governor of Mississippi.*

Impeached 1876, for selling a pardon to a convicted murderer, while the Governor was absent from the state. Although he attempted to resign, he was convicted, removed and disqualified.

THOMAS W. CARDOZO, *Superintendent of Education.*

Impeached 1876, for embezzlement of state funds.

Pending the proceedings, he resigned, whereupon the Assembly abandoned the impeachment, and the Senate, sitting as a court, adjourned.

NEBRASKA

DAVID BUTLER, *Governor.*

Impeached 1871, for having stolen state funds, receiving bribes and other corrupt acts in office.

The articles of impeachment in this case were adopted at an extraordinary session, called by the Governor to consider specific legislation. There was no mention of impeachment in the call.

The respondent filed a special plea to the jurisdiction of the court on this ground, which was overruled.

Convicted.

JOHN GILLESPIE, *State Auditor.*

Impeached 1871, for corrupt connivance with Butler in reference to expenditure of state funds and other misconduct in office.

This impeachment was never tried, and the following year, 1872, was withdrawn by the succeeding House of Representatives.

WILLIAM LEESE, *Formerly Attorney General.*

Impeached 1893.

Articles dismissed upon the ground that no impeachment could be sustained against a man who was not in office.

GEORGE HASTINGS, *Attorney General*; JOHN C. ALLEN, *Secretary of State*, and AUGUSTINE R. HUMPHREY, *Commissioner of Public Lands.*

Impeached 1893. Articles charged misappropriation to their own use of public funds.

Acquitted because of lack of proof of criminal intent.

NEW JERSEY

HENRY MILLER, *Justice of the Peace.*

Impeached 1830, for prosecuting before another justice of the peace for his own benefit a note which had been placed in his hands for prosecution and collection before himself for the benefit of the true owner thereof; for attempting to intimidate a defendant from appealing and for failing to keep accurate docket of the proceedings in his court.

Convicted and removed.

DANIEL C. COZENS, *Justice of the Peace.*

Impeached 1837, for issuing summons, entering judgment without the knowledge or consent of the plaintiff named therein, and for using profane language on the bench.

Acquitted.

PATRICK LAVERTY, *Keeper of State Prison.*

Impeached 1886, for improper relations with women prisoners.

Convicted, removed and disqualified.

PATRICK W. CONNELLY, *Justice of the Peace.*

Impeached March 15, 1895, for assaulting lawyer who had called upon him upon official business, and for falsification and alteration of his docket.

Convicted and removed.

NEW HAMPSHIRE

WOODBURY LANGDON, *Judge Superior Court.*

Impeached 1790, for unlawfully failing to hold court at appointed terms.

Resigned, and proceeding was quashed.

NEW YORK

JOHN C. MATHER, *Canal Commissioner.*

Impeached 1853, for corruptly favoring contractors; for letting contracts to personal friends for high prices; for neglecting inspection of canals; for claiming and receiving unlawful mileage and other improper conduct in office.

Answered. General denial.

At opening of trial, counsel for respondent moved to quash first five articles on ground that none of them stated impeachable offenses, the principal point being that the statute under which contracts had been let had been adjudged unconstitutional.

Motion denied.

Acquitted.

Managers.—R. Philfaxed Loomis, Marshal B. Champlain, Orlando Hastings, Solomon B. Noble, Walter Sessions, John McBurney, Daniel P. Wood.

Managers' counsel.—John K. Porter.

Respondent's counsel.—James T. Brady and Rufus W. Peckham.

ROBERT C. DORN, *Canal Commissioner.*

Impeached 1868, for conspiracy and bribery in letting contracts and other improper conduct in office.

Respondent moved to quash one article as too indefinite. Granted.

Respondent then moved to quash other articles on the same ground. Denied for reason that motion to quash articles must be made as to all articles at one time.

Acquitted.

Managers.—John C. Jacobs, John F. Little, Edmund L. Pitts, M. P. LeBeau, William S. Clark, William B. Quinn, John L. Flagg, Alpheus Prince.

Managers' counsel.—Smith W. Weed, David J. Mitchell.

Respondent's counsel.—Henry Smith, John H. Reynolds, William A. Beach.

GEORGE G. BARNARD, *Justice of Supreme Court.*

Impeached 1874, for unlawfully aiding as such justice, James Fiske and J. Gould to obtain control of the Erie Railroad and Union Pacific Railroad; for improperly favoring certain attorneys; for using obscene and vulgar language while on the bench, and for other improper conduct in office, during his then present term, and during a prior term of the same office.

Respondent moved to quash articles charging improper conduct during a prior term of the same office.

Denied.

Convicted, removed and disqualified.

Managers.—Thomas G. Alvord, W. W. Niles, Albert L. Hays, David B. Hill, James W. Husted, John C. Jacobs, Cyrillo S. Lincoln, L. Bradford Prince and Commodore P. Vedder.

Managers' counsel.—Josiah M. Van Cott, Daniel Pratt, John E. Parsons, Albert Stickney.

Respondent's counsel.—William A. Beach, John H. Reynolds, William O. Bartlett and Rufus F. Andrews.

NORTH CAROLINA

WILLIAM W. HOLDEN, *Governor.*

Impeached 1870, for wrongfully proclaiming counties of Alamance and Caswell in insurrection and occupying the same by military force; for causing unlawful arrests; for refusal to obey writs of habeas corpus, etc.

Trial interesting as it reveals Ku Klux secrets.

Convicted, removed and disqualified.

EDMUND W. JONES, *Judge Superior Court, Second Judicial District.*

Impeached 1871, for drunkenness in public places. A few days after impeachment he resigned, but the Governor refused to accept his resignation unless articles of impeachment were disposed of. The House, thereupon, withdrew the articles.

OHIO

CALVIN PEASE, *Presiding Judge, Third Circuit of Ohio.*

Impeached 1808, for deciding that a law giving justices of peace jurisdiction of a claim for more than twenty-five dollars and to prevent plaintiffs in other courts from recovering costs when they recovered judgment for more than twenty dollars and less than fifty dollars, was repugnant to both the State and Federal Constitution, and consequently void.

Answered, admitting facts and alleging that he only did his judicial duty as he saw it.

Acquitted.

JUDGE TOD.

Impeached at about the same time and for similar charges as against Judge Pease; was also vindicated.

JOHN THOMPSON, *Judge.*

Impeached 1811, for arbitrarily and illegally restricting counsel, in defending trial of one James Graham for larceny, to five minutes, for the purpose of summing up, against the respectful objection of such counsel; for refusing to sign a bill of exceptions when legally tendered, and making improper erasures in such bill of exceptions, and for other improper conduct as a judge.

Acquitted.

JAMES FERGUSON, *Justice of the Peace.*

Impeached 1813, for unlawful discharge of persons arrested under a warrant for assault; for refusing to permit the complainant in same case to testify on the part of the state, and for other improper conduct as a justice of the peace.

Acquitted.

PENNSYLVANIA

FRANCIS HOPKINSON, *State Judge of Admiralty.*

Impeached 1780, for accepting bribes and presents. Charges dismissed for lack of proof. Court concluded their decision

with an opinion expressing their disapproval of the acceptance of presents by public officers.

James Wilson, afterwards Justice of the United States Supreme Court, and Jared D. Ingersoll were among attorneys for respondent.

JOHN NICHOLSON, *Comptroller General*.

Impeached 1793, for improper recognition of new loan certificates, which had been issued in pursuance to previous act of the Legislature, which had been annulled by a later act. For certifying that they were redeemable, and for appropriating the proceeds of some certificates to his own use.

Acquitted, but he resigned immediately thereafter.

On the same day, both houses of the Legislature passed a resolution for his removal as comptroller. Upon the Governor being notified of this action, he advised the Legislature that the respondent had superseded the removal by resigning his office.

ALEXANDER ADDISON, *President of the Court of Common Pleas in the Fifth Judicial District*.

Impeached 1802, for making political harangues in addressing grand juries, and for insulting associate judges in court.

Convicted and removed from office.

Prosecution conducted by Alexander J. Dallas and McKean, as counsel for House of Representatives. Addison defended himself in person with great vigor and ability.

Challenge of members of court not sustained.

EDWARD SHIPPEN, JASPER YEATES, and THOMAS SMITH, (*being all of the Judges of the Supreme Court of Pennsylvania, except Judge Breckenridge, the only democratic member thereon*).

Impeached 1804, for illegally adjudging one Pasmore guilty of contempt and sentencing him to jail for thirty days — the contemptuous action not being in the presence of the court. This was apparently a political impeachment and failed.

Respondents were acquitted.

WALTER FRANKLIN, *President*, and JACOB HIBSHMAN, and THOMAS CLARK, *Associate Judges of the Court of Common Pleas of Lancaster County*.

Impeached in 1816, for improperly refusing to compel certain attorneys to pay over client's money which they had collected and unjustly retained.

Acquitted.

The same Judge Walter Franklin was again impeached in 1825 for delaying administration of justice.

Acquitted.

ROBERT PORTER, *President Judge of the Third Judicial District*.

Impeached 1825, for refusal to furnish his reasons for a report which he made as referee and for dismissing exceptions to such report, for the reasons assigned by the party in whose favor the report was made; for insulting litigants in court; for compounding a felony; for intimidation of jurors, etc.

Acquitted.

SILAS CHAPMAN, *President Judge of Eighth Judicial District*.

Impeached in 1826, for illegal arrest; for refusal to file his opinion in case where unsuccessful party desired to review by writ of error, and for favoritism on the bench.

Acquitted.

TENNESSEE

THOMAS N. FRAZIER, *Judge of Criminal Court of Davison County*.

Impeached 1867, for issuing a writ of habeas corpus against members of the Legislature, who had been imprisoned by the Legislature, and for refusing to accept a return of the sergeant at arms of the Legislature, stating said fact, and punishing said sergeant at arms for contempt of court.

Convicted, removed from office and disqualified.

WEST VIRGINIA

JOHN S. BURDETT, *Treasurer of West Virginia.*

Impeached 1875, for agreeing to keep state moneys on deposit in banks which would loan moneys to his son, and for accepting gratuities; careless conduct of the business of his office.

Convicted, removed and disqualified during remainder of term.

EDWARD A. BURDETT, *Auditor West Virginia.*

Impeached 1876, for failure to keep account of moneys received and disbursed by him; for refusing to make official reports, etc.

Acquitted.

WISCONSIN

LEVI HUBBELL, *Justice of Second Judicial Circuit.*

Impeached 1853, for consulting with one of the counsel in a case pending before him during and after the trial, at the same time borrowing from the same counsel \$200. For presiding and adjudicating cases in which he was personally and pecuniarily interested; for other improper and indecent conduct in office.

Acquitted.

Final argument on behalf of the Managers, October 10, 1913.

Mr. Brackett.—With the permission of the Court: I think myself happy, members of the Court, that it is given to me to speak to you at this time. The time, the place, the cause, conspire to high thought and mighty endeavor. “The blood more stirs to rouse the lion than to start the hare.” The pulse runs higher, the heart beats stronger, in defense of the honor of the Commonwealth, here fearfully assailed from within, than in a cause less sacred. He to whom is given the opportunity to aid in shielding the mother who bore him, the father who begot, or the state which has nurtured him, is thrice happy and blessed among men.

No one, even slightly acquainted with the history of this greatest of the states, and of the names that make that history a glorious one, can avoid a prideful satisfaction that, in the performance of duty, it is given to him to plead in behalf of her good name. It is with that pride and that satisfaction, that the managers of this impeachment come before you in this final stage of this historic trial, to press upon you that you cast from her service one who has forgotten her honor and has been faithless to the trust that she reposed in him.

In doing this, I beg you to believe that there is nothing akin to professional exultation in having been able to develop the facts requiring the conviction of the defendant, but, rather, only a feeling of the performance of a solemn duty to the people of the State.

At the time of the commencement of this proceeding a few weeks ago, it was something over forty-one years since the Assembly of the State, the representatives of all the people more truly than any other officer or body known to the law, in the performance of a great duty, exercised the functions laid upon it by the Constitution and the laws, in the impeachment of a high official of the State. In our freedom from high crime in public place, we had almost forgotten the machinery for its redress. In

a revision of our organic law made during that period, the provisions for the impeachment of a public official were regarded as so little likely to require use, that they received scant attention at the hands of the learned men reviewing them, and left open for high discussion here questions that could have been speedily and definitely settled there.

Through the mists of the years that last State trial rises before us with singular distinctness. In the course of our proceedings here it has been looked to with profoundest respect for precedent and for argument. And as I have studied its record, I have prayed that it would be given to us here, each in his own place, members of the Court, counsel, the officials who have served us, to take high courage from the examples there set us, and to meet our duty here as they met theirs there.

And yet I do not remind you of this high occasion, nor of the exemplars who have gone before, to render you timid in the performance of your work. The intelligence that has been given to us is for use in the doing of great, as well as of small, duties. We must take the final steps in this proceeding in precisely the same spirit that we do our daily round of petty duties through the years. Unawed by responsibility, unafraid of the consequences of any result, unafraid of any result itself, except a wrong one, with appreciation of the great opportunity given us to do a lasting service for the right, laying aside any baser motives, let us here highly resolve to proceed, as it is given to us to see the light, and with manly hearts.

Not speaking now to the members of the Court accustomed daily to render judgment, to whom the ascertainment of right is a study and justice a habit, but only to those others unacquainted with judicial work, let me, as one familiar with every temptation that can come to you in the performance of such duty, address myself to you a moment.

From the beginning of the impeachment proceedings brought against William Sulzer, nay, from the time that his crimes were first whispered around these halls, on behalf of the defendant there has been a persistent and studied attempt to terrorize the members of this Court and every person associated with the prosecu-

tion. Every art known to the demagogue has been attempted to accomplish it. The press, a few of its members venal, many of them thoughtless of the grave situation presented, have daily paraded much hopelessly bad law and have direfully threatened those who were so singular as to say that they doubted the wisdom of allowing a criminal to remain in the executive chair. Political extinction has been threatened to those bold enough to urge that it might be well to have an orderly investigation of the matters charged against this man. Counsel have been warned that their appearance for the people here would result in savage attacks upon them. We have witnessed the indecency — for I think it can be called nothing less — of public meetings called to overawe your judgment and to give you instructions how to decide this cause, before a single word of sworn testimony had been given to you. In season and out, it has been preached that justice would not be done here, when justice was the last thing desired by the preachers. No such campaign has ever been devised as the one that has thus attempted to influence and to terrify you from the performance of your duty.

Against all this I hold up to you the simple oath that you took at the beginning of this trial. Its solemn words are fresh with you, and I know that in their presence the least thoughtful will be sobered to the fullest sense of his duty, as I know too that this wave of clamor will never rise in its influence to the level of the soles of your feet.

I recall to your minds the words of one of the senators upon the trial of the President, when, standing the heroic figure that he was, in very travail of soul, he wrote:

“To the suggestion that popular opinion demands the conviction of the President on these charges, I reply that he is not on trial before the people, but before the Senate. In the words of Lord Eldon, upon the trial of the Queen, ‘I take no notice of what is passing out of doors because I am supposed, constitutionally, not to be acquainted with it. . . . It is the duty of those on whom a judicial task is imposed to meet reproach and not court popularity.’ The

people have not heard the evidence as we have heard it. The responsibility is not on them but upon us. They have not taken an oath to 'do impartial justice according to the Constitution and the laws.' I have taken that oath. I cannot render judgment upon their convictions, nor can they transfer to themselves my punishment, if I violate my own. And I should consider myself undeserving the confidence of that just and intelligent people who imposed upon me this great responsibility, and unworthy a place among honorable men, if for any fear of public reprobation, and for the sake of securing popular favor, I should disregard the convictions of my judgment and my conscience. The consequences which may follow either from conviction or acquittal are not for me with my convictions to consider. The future is in the hands of Him who made and governs the universe, and the fear that He will not govern it wisely and well would not excuse me for a violation of His law."

Still another distinguished senator, in announcing his judgment in the same case, said this:

"My duties are clearly judicial, and I have no concern with, or responsibility for, the consequences, political or other, that may flow from my decision."

Brethren of the Senate, men many of whom I know of my own knowledge, and all of whom I believe, to be of high mind and lofty ideals, men with many of whom through the years it has been my privilege to clasp hands in love and friendship, unless and until you shall reach the spirit of these great men who thus spoke, you do not come up to the mark of your high calling, but, having reached it, you are worthy to sit in judgment in this air of judicial calm that may not be found outside.

Whatever may be thought elsewhere, here you will place your "bark upon the highest promontory of the beach and wait for the rising of the tide to make it float." And that every one of you

will come up to this level in your deliberation and your judgment, I have never for a moment entertained a doubt.

“So nigh is grandeur to our dust,
So near is God to man,
When duty whispers low, ‘thou must,’
The youth replies, ‘I can.’”

So, to all those who have professed doubts as to whether justice would here dominate, who have sought to discredit in advance the patient fairness by which every right of the defendant has been here conserved throughout the days, to all “Right Reverends” and “Wrong Reverends,” everywhere, who profess to find here, not the solemn performance of a public duty laid on you by the law, but only an opportunity to scourge and strike a political enemy, I send greetings and, inviting them to learn from the great apostle moderation of speech, ask them to come and see how, under the strictest forms of law, divesting themselves of every unworthy motive and thought, the representatives of a free people come together and give judgment.

The charges against the defendant William Sulzer are eight in number. I shall not consider some of them at any length. Three of them may be treated together. The first charges the defendant with having made and filed a false statement of his election receipts and expenditures; the second with having made a false statement and having attached thereto a false affidavit; and the sixth with having made collections of campaign contributions which he failed to report in the statement and which he converted to his own use, whereby he was guilty of larceny.

The third article charges the defendant with having kept certain witnesses from attending before the Frawley committee; the fourth with having kept certain witnesses named, and all other persons, from going before the Frawley committee so that they could not and would not give testimony; the fifth with bribery, if I recall; the sixth is the one for larceny; the eighth is the matter of the stock speculations.

What answer has the defendant made to these charges? The answer which he has brought here, signed with his own hand, and

filed with this Court to stand on the records to the end of recorded time, is typical of the man and typical of his every effort and act that has been proved in the case.

He comes into this Court, having exhausted every dilatory motion and every point of law which the ingenuity of the most learned counsel in the State could discover to raise here, having exhausted all these in an effort to secure the dismissal of these charges without being called upon to meet the great, crucial fact as to whether or not he is guilty, and without being called upon to put in any evidence, he comes here and files his answer, files a false answer over his own name. What is that answer, in the light of the testimony that is here unanswered in the slightest degree, uncontradicted to the extent of a syllable — what is that answer? He comes, and, admitting the mere formal facts set out, that he was a candidate for Governor and is now Governor, and that he did file a statement, every one of which facts, of course, was susceptible of proof here within ten minutes from the time that the Court convened, thereupon, solemnly, in the face of all the people of the State, files with this great Court an answer which is itself an infamous lie, saying that he denies each and every one of the other than these formal facts set up in article 1. If you will consider from now to the end of the chapter that it is typical of this defendant, wherever he thinks the proof cannot be found, to submit a denial, you will find the key to the answer of many a question that will be put to you in the consideration and final decision of this case.

These being the pleadings, what is the proof? And when I come to the question of proof, I confess to you that I am embarrassed beyond measure. Ordinarily it is given to counsel, where there has been evidence submitted on the trial of the case, to argue that this bit of evidence is true, and that not; to argue that this witness has sworn truthfully and that one not; to balance the probabilities in the case; to see where reason and experience point the line of truth between conflicting statements.

But here, what is there? If I commenced to argue before this Court as to the truth of the evidence submitted on behalf of these managers, I would be justly called by the Presiding Officer, who might say, Why do you argue to something as to which there

is no possible contradiction? And so it is like arguing with the east wind, or it is similar to wrestling with the ague. You cannot get ahead by anything that can be said, because the simple statement of the facts demonstrates that the evidence given on our behalf here is true, and that there is not a single word of contradiction with respect to any part of it.

In the statement that was filed by this defendant, made out on the 13th of November, and filed in the Secretary of State's office on the next day, he certified to the Secretary of State and to all the people of the State by whose grace and favor he had received a majority of the votes at a previous election, that he had received as contributions during his campaign the sum of only \$5,460, the donors of which were named and were sixty-eight in number. He certified that the expenses which he had incurred during that campaign were \$7,724.09, and thereby he meant to have the people of the State, and any one who would come and read, to believe that he had been elected by the contributions of but sixty-eight small contributors who, altogether, had given him during his campaign less than \$100 apiece as an average. The thought that was in his little mind as he did this was, posing as he had posed during the years, as one who was still in the Congress a poor man, fighting the people's battle, that it would appear that the great common people were the ones who were his friends and the only ones who had contributed anything to his election; that they, people of most moderate means, had risen in their might and chosen him; that all the great interests that cluster around Broad and Wall streets, all the interests that might come here and want legislation, all those interested in politics, were opposed to him and that it was only the little men contributing, as I say, less than \$100 apiece who had made William Sulzer the Governor of the State. It was only they who had contributed to the expenses of his election, as he certifies to the Secretary of State and the world. The working of his mind on these lines shows his inexpressible littleness.

What is the uncontradicted proof with respect to the contributions made to him? What answer does my friend or either of the learned counsel who have argued here, make? What answer is there? The uncontradicted proof stands here — you will find the

details of it in the sheets that have been passed around, and which, while one of the learned counsel says they are incorrect, have not had their incorrectness pointed out in the slightest degree — it stands that every entry made in this sheet is proved and proved beyond cavil and without contradiction by the evidence in the case, and reference is made in the paper itself to where that evidence will be found.

By that paper it is shown, and by the evidence therein referred to it is proved, that during the time of his campaign, although he had reported receipts of but \$5,460, there had been paid to him in the way of contributions, checks that had been actually traced to him, and upon which there are marks which he could not avoid or escape, \$12,700, or more than twice as much unreported as he had reported. It is demonstrated that there was of cash that has been traced to him, unreported in this statement which he thus filed, the sum of \$24,700, or nearly five times as much as the amount which he admitted in his statement he received. And it has been demonstrated, the shameful fact has been demonstrated, that, although when nominated he had no money and was deeply in debt during the time of the campaign, he paid to brokers in Wall street securities \$40,462, much of which was in the very checks which were handed to him for campaign purposes.

Ah, but, says the defendant, "these people were so enraptured with my previous personal history, they were so in love with the situation that made it possible for me to be Governor, that, knowing the necessities with which I was afflicted, they made a purse for my personal comfort and to relieve me from the slough of debt in which I had been wallowing for years."

I want to stand for the proposition, that he who is nominated a candidate for a public office, who receives contributions during that campaign, if nothing is said on the subject, receives them with the implied understanding and obligation that they are for the purposes of his campaign. There shall be no opportunity for hair-splitting as to my position on this point. The man who so far refines that he can claim to himself or to another, let alone

to this high Court, that, having been nominated for an office by a great party in the State, when contributions are made to him, whether by personal friends or by persons interested in the success of the party, he may out of his own grace, if I use the language of the catechism right, say, "This check is mine; this large check is mine; that little one is for the purposes of a personal campaign; this one I will not report; that one I must and will"—the man who thinks that he may do that is the first in all our history to do it, for no other human being from the time we have had popular elections until the present moment has ever had the hardihood to come and make any such claim.

What is the exact situation in which a candidate for place, who receives contributions, stands? He is not nominated for his own glory, however this defendant may have thought that he was. It was not for the glorification of William Sulzer that he was nominated as the candidate of the Democratic party for Governor on that morning of the 3d of October, 1912, at Syracuse. He was nominated as a representative of a party; he was nominated to be supported by the party, and when the contributions came in from that moment, any man who had any conception whatever, not simply of ethics, but of decency, knew and recognized, and must have known and recognized to the full, that they were contributions because the contributors desired the candidate of the party should be elected to the place for which he had been nominated and because the contributors had an interest in the success of that party.

But it is said "These were personal." "These were personal," and one or two had been marked "For his personal campaign," and it is claimed that that differentiates between two elements of the personal.

A contribution may be personal, in that it is to be for the candidate's personal campaign particularly, in that the contribution is made by some friend for the purpose of enabling some particular machinery to be put in motion, some particular committee to be appointed, some particular thing to be done for this particular candidate as distinguished from all the others that are taken care of by friends in the same way — their friends. There

the contribution is made for the personal campaign. And if it is thus regarded as made by friends, or shown to have been made by friends, if it is said that it was for the personal campaign, or if nothing is said with respect to it, and it is handed to the candidate, then there is every presumption, not only presumption, the fact demonstrates in such case, that the contribution is made to the individual for his personal campaign. But when he, calmly ignoring that fact, says that it is for his personal use, he ignores an essential basic fact which cannot properly be ignored, and he makes conversion of the money. And, when added to that, he indulges in the ridiculous proposition that the contributions that are made to him for his personal campaign may properly be put to the bucking of the stock market, he has drawn a picture of himself which needs very little else to paint in, full and complete.

What is there about this element of personal contributions? It is not necessary to support these charges that it should be shown that every contribution given to him was for a campaign purpose, and not personal to his own use, that is, his private use. If we show a reasonable amount, if we have shown that there are enough of such contributions for campaign purposes, in number and in amount, that they could not have been overlooked by any possible doubt, that no honest man could have failed, when he came to put his name to the affidavit or his name to the certificate, to remember them, then we have shown that he has been guilty of not reporting contributions that he should have reported, and we have shown that he has been guilty of (1) a false certificate; (2) a false affidavit to the certificate; (3) a conversion of such contributions to his own use and, therefore, larceny under our statute.

If we show a half dozen or ten contributions thus made, of substantial amount, and which he failed to report, it is not of any consequence in the settlement of the question of his guilt or innocence that there may have been one or two as to which there was a doubt, as to whether they were personal contributions to buy him a hat and a suit of clothes.

What contributions are shown here now, as to which there is no possible doubt of their purpose?

In this list I leave out those where there is any doubt whatever. I do not mean to include any except those as to which no honest man can read the testimony and believe that they were anything else than campaign contributions, either for use in the general campaign, or in his personal campaign, but certainly for the campaign.

There was the check of Mr. Pinckney for \$200.

There was the check of Mr. Gwathmey for \$100 which he says in so many words, in a letter, was for his personal campaign.

There is the check of Mr. Coler for \$100.

There is the check of Morris Tekulsky.

The check of Peter Doelger for \$200.

The check of Abram I. Elkus, which he says expressly in his letter, with which it was enclosed, was to be used for campaign expenses, \$500.

The check of Mr. Uhlman for \$300.

The check of Mr. Spalding for \$100.

And the cash from Thomas F. Ryan of \$10,000.

Not one of these items which I have thus detailed to you can by any possible torturing of the evidence, be made to warrant the use of the funds for private purposes; not one of them. Take the contribution of Mr. Ryan. What does Secretary McGlone say? He says that the candidate asked for money, \$7,500 or as much more as they would give him; that he was about to go up campaigning in Westchester county and needed the money for that purpose. McGlone carried to him the ten one thousand dollar bills and gave it to him, as he said, for his personal campaign. Do you think — and Mr. Presiding Judge, I hesitate to ask the question as an insult to your intelligence — do you think, can any rational man think for a single minute, that when, on the 13th day of November, 1912, William Sulzer affixed his signature to the statement that he had received during the campaign \$5,460, only, there was not running in his mind at the very instant that he did it, "And I have \$10,000 of Thomas F. Ryan's money in my pocket this minute, as clear gain"?

What about the \$2,500 from Mr. Schiff? Now, I am not at all going to pass over, nor slur, nor fail to meet, the very merry contention of counsel on behalf of this defendant that Mr. Schiff's contribution was personal to him and that he had a right to use

it for anything he pleased. The internal evidence, aside from any oral evidence, demonstrates the utter falsity of that claim. Mr. Schiff himself said that it was for his personal campaign, and as evidence of precisely what was Mr. Schiff's intention, you have endorsed on the check, in his own handwriting, made afterward, but at a time when the matter was under investigation and when he was telling the counsel for the committee the purpose for which it was given, in which he stated that it was for campaign purposes. Do you think that Jacob H. Schiff, the head of one of the great houses in New York, did not know in the month of July, 1913, when he made that endorsement on the face of this check, for what he had made his contribution to William Sulzer in the previous October?

But further, let us see about this claim that Mr. Schiff was so touched with William's infirmities that he was going to help him out to the extent of \$2,500. What would be the object for a man, an honorable man, like Jacob H. Schiff, if he were going to give William Sulzer a present of \$2,500 for his personal use, not to give it to him openly, without concealment or shame? Would he not have given him a check when Mr. Sulzer came in and asked him how much he was going to help him for his campaign, Mr. Schiff having congratulated him? Do you think that Schiff, if he was going to give him \$2,500 for his personal use, would not say, "I won't give anything to your campaign; I give you \$2,500 for your own purposes."

But if he did not want, if Sulzer did not want, the \$2,500 check floating around so that it would be seen that he had relations with Mr. Schiff—I can imagine that the representative of the great common people, whose apostle he had so long been in Congress, perhaps might feel a little delicacy on the subject of having Mr. Schiff's check for \$2,500 with his endorsement—if this was for his personal private use, and they wanted to keep it secret, then Mr. Schiff would have handed him \$2,500 in bills. Did he do that? This man having come in and said, "How much will you let me have?" Schiff having said, "\$2,500," to which the defendant rejoined, "Can't you do no more?"—if Mr. Schiff had intended to give a personal contribution for his own benefit, if he meant to make a present to him for his own personal benefit, wouldn't he have handed him the bills?

What was done? "Mr. Schiff, make this payable to Louis A. Sarecky." Who is Sarecky? Sarecky is the man who had opened the account in the Mutual Alliance Trust Company, and for what? Personal gifts to William Sulzer. Sulzer had his account, where his personal matters went, in the Farmers Loan and Trust Company. What did Sarecky have this account there for? It was for the purpose of putting into it what? The contributions that were made to William Sulzer for the campaign, and nothing else. And thereupon, Mr. Schiff, having carefully written down the name, the check is made to Louis A. Sarecky, and taken over to Sarecky. And what did Sarecky do with it? Put it into this account where campaign contributions went. What on earth was it doing in the Sarecky account, where there was only, aside from Sarecky's little personal matters, campaign contributions from which the statement was finally made up? Have you any doubt on the subject?

Lét us get away from the sham and the pretence that the Schiff check was anything else than a contribution made for campaign purposes. Do you think when he came to make his false certificate and to certify to the Secretary of State and to all the world that he, the apostle of the plain people, had been elected with contributions of only \$5,460, that he did not know alongside, in his brain, of the fact of Mr. Ryan's \$10,000 check, that there was the \$2,500 check of Jacob H. Schiff, as to which he was fully the gainer? For a real friend of the common people, hating everything that looks like a trust, I must say that he absorbed a reasonable amount of trust money for one campaign, when he got \$10,000 from Thomas F. Ryan, a gentleman popularly supposed to have some connection with a trust or two, and \$2,500 from Jacob H. Schiff, who is surely not entirely removed from trust influences himself.

So the certificate was false. And so the affidavit that was made to it was false. And so he stole the money.

I am not now discussing the question of perjury. I am not going over the law, as my associate, skilled on the criminal side of the law, gave it to you here earlier in the trial. We stand here on every line and every word of the brief which he thus filed here, and I shall not go over it again.

The certificate was false. The affidavit which he made there was false. Whether or not he can escape prosecution for perjury on the claim that, because it was not required by the statute that he should swear to it at all, whether he can escape the penitentiary or the State's prison on that plea, is not here at all. When he put his name to the affidavit and swore to it before Abraham J. Wolff, he swore to a lie, and he knew that he was swearing to a lie; and whether or not he was guilty of legal perjury that would justly land him in the State's prison, he was guilty of the moral perjury, he was guilty of all the blackness of intention, of all the guilty heart that he would or could have had, had the oath been required by statute, as he believed it was.

But the first of January comes, and from that moment, says his counsel, he is a converted man. Ah, my brothers, there are some of us here to whom through the years the question of conversion has been very much before our eyes, and yet I cannot fail to remind you that the great Methodist church which stands today, as it has stood from the beginning, firm in the belief of the necessity of a conversion from sin, before conversion demands repentance. My brother from the 27th senatorial district, when you were standing behind the sacred desk, a minister of the gospel, never yet have you permitted to join the Church, a man whom you did not believe in your heart had repented of his sins.

Oh, but on the first of January, like Saul of Tarsus on his way to Damascus, there came a light. Where, before that moment, he was in gall of bitterness and bondage of sin, although prior to that time he had done nothing but serve the forces of evil, yet from the first day of January, when the light came to him, William became a consecrated man and devoted himself thenceforth to the service of God and humanity in the People's House.

Oh Saul! Saul! Persecutor of the Saints, but, finally, the greatest of the Apostles, what foolishness has been attempted through the years because of that sudden conversion of yours on the way to Damascus! There is many a man who tries to liken himself to Paul when the only likeness is to that of Saul. And even there the likeness is not strong. Saul saw a light, but he respected it. He repented of his sins. Saul, having seen the light, announced that from that moment he renounced the Devil

and all his works. He did not thereafter go around trying to suborn perjury. When he got together the few Christians in the upper chamber, wherever he could get them, to preach the Word, after his conversion, he did not whisper to one of them that if he was sworn he hoped that he would be easy on him. Before he opened the meeting with prayer, he didn't call one of them aside and see if he could send word to tamper with the court that was going to try him. And he finally won a glorious martyrdom by sincerity, and not by posing; by honest work, not by many professions; by doing the word and not by being a rank hypocrite.

Can you imagine Paul telephoning to Gamaliel that he was "the same old Saul," and "can't you make it more than \$7,500?"

"Tell your father I'm the same old Bill." Ah! What a flood of light streams from that single bit of evidence, that stands here undenied — true. "The same old Bill" who, through the years, had been rendering Ryan valuable service, while loudly professing to be the enemy of all trust magnates. "The same old Bill," who wanted to continue the relation at "the same old rate"—\$7,500, and "as much more as I can get" per — yes, "the same old Bill" in every way.

These are the facts. The certificate was false. The affidavit was made with all the blackness of heart that could cause a man to be guilty of rank perjury. And then he took every dollar that was thus contributed to him, of which I have given you a list, and went to play Wall street, and bought Big Four stock.

Oh, well, our friends say, that is all true; that is all true, and it may not have been quite ethical; it was not quite ethical. Perhaps it was unmoral, a little unmoral, but still he has been elected by the people and you can do nothing.

Is the election law a joke? Is the statute, for the passage of which, and the perfection of which, high-minded men and women during the years have come here year after year for the purpose of getting it into some kind of shape where, if the use of money in elections can not be prevented, it can at least be exposed — is all this an idle thing? A law which never yet has taken any step backward, where every step that has been taken at all has been in the direction of making it stricter, of making it more

perfect, so that no one should be able to slip through its meshes — is this law now discovered to be a joke? Is it only a question of the lighter ethics whether it shall be obeyed or not?

I read you from Exhibit No. 130 for identification "Sulzer's Short Speeches":

"In my opinion, this publicity campaign contribution bill is one of the most important matters before the House. It is a bill for honest elections to more effectually safeguard the elective franchise, and it affects the entire people of this country. It concerns the honor of the country. The honest people of the land want it passed. All parties should favor it. Recent investigations conclusively demonstrate how important to all the people of the country is the speedy enactment of this bill.

"I have been for years a consistent advocate of this legislation. I have done all in my power to get a favorable report from the committee, and I shall do all I can to enact the bill into law. Many people believe that if a law were on the statute books similar to the provisions of this bill the Republicans would not have been successful in the election of 1896. The Republicans succeeded that year because they raised the largest corruption fund in all our history."

And then, with a grin, thinking how he was fooling the people, he telephoned Ryan "I'm the same old Bill; I would like \$7,500, and as much more as you can make it."

"Pigmies are pigmies still, though perched on mountain peaks, while pyramids are pyramids in vales."

My friends have waxed earnest, to say nothing of eloquent, to the proposition that, in all the years while there has been every effort made to make this law so that it would require to be done just what was intended by it, the wisdom of the Legislature and the Executives who have concurred in the passage of this law has been so at fault that today it means nothing. If you hold this man guiltless of crime in this connection, at least, members of the Senate, have the decency to introduce a bill to repeal that portion of the election law known as the corrupt practices acts, and have it done quickly and thoroughly.

It is said by my most learned friend, and it is a labor of love to

him I know, to say it, that while this does stand in the election law, yet there is no penalty that makes it a crime, and, therefore when this defendant signed this false statement and filed it and swore to it, he was not guilty of a crime.

In the 560th section of the election law, you will find the provision which succeeds the various steps of procedure prescribed by the statute, how there can be an investigation, and after the procedure is thus prescribed down to judgment, follows this language: "If such person or persons," and that comprehends a candidate, "or committee or committees, have failed to file a statement or have filed a false or incomplete statement, and such failure to file or such false or incomplete statement was due to a wilful intent to defeat the provisions of this article," and is there any doubt on that?— I omit some intervening verbiage not material — "the person or persons, or committee or committees proceeded against shall be liable to a fine not exceeding \$1,000 or imprisonment for not more than one year or both."

In a previous section the failure to obey the law is continually spoken of as a violation of the section, a violation of law and the punishment there is prescribed. So that the section does provide a punishment for the person who either fails to file a statement or files a false statement, and if it provides the punishment, as it does, of imprisonment or fine, then it is a crime, because under the Code definition, that is a crime which is punished either by fine or imprisonment. It is not of the slightest consequence, in the reading of the section to the punishment of the offender, whether there was any preliminary proceeding before a judge or not. It is not the proceeding before the Supreme Court justice that makes the crime. The crime exists when he files the false statement.

So it stands. It stands unanswered. It stands unanswered either in law or in fact here that this man had received contributions to the amount stated; that he had filed a false statement with respect to them; that he had attached a false oath to it; that he had committed larceny of the funds, and it stands that in so doing he committed crimes that are punishable by fine or imprisonment.

I pass now to the fourth article, and as I remember, while I have not heard all of the arguments of the defendant here, it is an

article as to which our friends in their argument sang a very low song. I purpose to read with your permission, and perhaps to your tiring, a few lines from that article. It charges the defendant, William Sulzer, then the Governor — the formal parts are familiar to you — and while the Frawley committee was investigating: “While such committee was conducting such investigation and had full authority in the premises, he, the said William Sulzer, practiced deceit and fraud and used threats and menaces with intent to prevent said committee and the people of the State from procuring the attendance and testimony of certain witnesses, to wit: Louis A. Sarecky, Frederick L. Colwell, Melville B. Fuller, and all other persons, and with intent to prevent said persons named, and all other persons severally, they or many of them having,” and so forth, from giving testimony before that committee.

The article then is broad enough to allow testimony of such attempt as constitutes an infraction of the section, and the testimony which I note hereafter came in under this article without objection, because it was known to be relevant and competent, and there was no objection that the article was insufficient to receive the testimony.

Now, the law on the subject making this a crime, is this, and it is contained in section 814 of the Penal Law:

“A person who maliciously practices any deceit or fraud, or uses any threat, menace or violence, with intent to prevent any party to an action or proceeding from obtaining or producing therein any book or paper or other thing which might be evidence, or from procuring the attendance or testimony of any witness thereon, or with intent to prevent any person having in his possession any book, paper or other thing which might be evidence in such suit or proceeding, or to prevent any person being cognizant of any fact material thereto from producing or disclosing the same, is guilty of a misdemeanor.”

Let me now read the words of the section, leaving out words that do not bear directly on the contention here made:

“Any person who maliciously practices any deceit or fraud . . . with intent to prevent any party to an action or proceeding . . . from procuring the attendance or testimony of any witness . . . is guilty of a misdemeanor.”

There can be no question that the doings of the Frawley committee constituted a proceeding. It was not an action at law to recover from William Sulzer \$30,000 which he had converted. It was a proceeding that would result in the wish on William's part that he had repaid it, but was not an action to recover. It was an investigation to discover crime, whether actual or potential, precisely as a coroner proceeds for the same purpose. It was a proceeding. The committee representing the Legislature was a party to the proceeding, as were the people of the State.

It will be noted, in limine, that under the section, no consummation is required to constitute the crime. All that is required is malicious deceit or fraud, with intent to prevent the attendance or testimony of any witness. The malicious feature takes care of itself. If the intent is shown the law stamps it as malicious, just as malicious injury to crops is shown when it is shown that the injury was intentional, and all that can be shown in that connection is intention. The word malicious only imports an evil intent, as is prescribed in the Penal Law, section 3, subdivision 3.

Whether the testimony was actually prevented is not of the slightest consequence. When the deceit is maliciously practiced, with the intent to prevent, the crime is complete.

We come now to the proof. Mr. Morgenthau had contributed \$1,000 to the defendant on the 5th day of October, 1912. It was given to help the defendant in his election, in his canvass. If any of you have any question as to the exact correctness of my words, you may look at pages 492 and 420 of the record and you will find Mr. Morgenthau's language.

On the 2d or 3d of September of the present year, 1913. the defendant called up Mr. Morgenthau at Port Chester and asked him if he would come to Albany at once. Mr. Morgenthau declined, giving his reasons, and thereupon the defendant said, "If you are going to testify, I hope you will be easy with me," and then added, as Mr. Morgenthau here testified, "He said something about that I should treat the affair between us as personal," and the witness added in his testimony here on the stand, "I said that I could not."

The damning character of the defendant's request is apparent at a glance. He wanted Mr. Morgenthau not to go before the

committee, or, if he did go, to perjure himself to save him, the defendant, from the results of his previous crime in not reporting the Morgenthau contribution made to him during the campaign, and thereby he brought himself precisely within the section of the Code and precisely within article 4, here presented by the Assembly.

The Frawley committee was in existence, as it still is, and was holding hearings. The defendant deliberately sought to prevent that committee from securing Mr. Morgenthau's testimony or at least from securing his true testimony and to get the latter, Mr. Morgenthau, to perjure himself in his, the defendant's interest. But the defendant's learned counsel urge that the transaction was personal, that Mr. Morgenthau's contribution was for personal use; that he asked Mr. Morgenthau to testify only to the truth in the request that he made to be easy on him and to treat it as personal.

Do criminals find it necessary to solicit witnesses to tell the truth? Is it not presumed that they will do so, particularly if they are men of high character, as Mr. Morgenthau is? What was there in the character of Mr. Morgenthau that led the defendant to believe that he would testify to anything other than the truth? And that it was necessary to call him up on the telephone to get him to be sure and tell the truth? Did he think that, unless thus solicited, the witness would swear to a lie? That is unthinkable. And, mark you, as denominating and stamping and sealing the entire transaction, mark what he said at the end of the conversation. What he wanted done was something that Mr. Morgenthau at once recognized as improper, and told him that he could not do it. It was not the truth he was seeking to have Mr. Morgenthau tell on the stand, because, if it had been the truth, Morgenthau would not have said he could not do it. It is the fact that he wanted Morgenthau to go down, with black perjury on his lips, and testify to save this criminal here on South Eagle street. And the only reason that Morgenthau said that he could not do it was because he at once, instantly, recognized that it was an untruth and a rank perjury that the defendant was soliciting him to commit.

The testimony of Peck, the Superintendent of Public Works,

is still more direct. Did your Honors notice that, in all of the outburst against Peck by the learned counsel here yesterday and today, they never said a word against Mr. Morgenthau? They carefully looked over the field of witnesses that were convicting this defendant here, to see which ones they should attack as untrue. They did not dare to come and argue in the face of a single member of this Court, that Morgenthau had told an untruth here on the stand. Morgenthau, a man of the highest ideals, a man of large affairs in the city of New York, a man who had just received a certificate of probity and of the highest character in the appointment as Ambassador to the Empire of Turkey; they did not dare to say that he had committed perjury. But, ah! "Peck, Peck, we must attack Peck."

Many of you have known Peck longer than I have. I hold no brief here for the purpose of defending him or his character, further than as it is shown by the testimony that he gave in this chair. But I know that this man was appointed to high and most responsible office in this State by a previous Governor. And I know that he was continued in office by the present Governor from the first day of January down, when any moment he could have been removed simply upon the ipse dixit of the defendant. I know that he stands, and the presumption is that he stands, in Syracuse, his home, beyond reproach in public or in private life. And to the learned counsel I want to say that the attack on Peck here was wholly unjustified. It was made on grounds outside of the record entirely. It was made on an assumption of which there was not a word of proof here; the assumption that something had been found wrong in Peck's department. And it only shows the malice that is in the heart of this defendant, that tears down any man, no matter whom, if he thinks that he may thereby better his own condition to save himself from just condemnation.

The witness Peck had contributed \$500 to the defendant for his campaign, handing it to the defendant personally, in bills, at Troy, in the month of October, 1912. He received a letter from the Frawley committee, asking him to state what contributions he had made, and, somewhere after July 19, 1913, he saw the defendant in the executive chamber. He showed to the defendant the letter he thus received from the Frawley committee, and asked

him what he, the witness, could do about it. And the defendant made what reply? It was not as these gentlemen of the press reported it — that is, they did not report it all. The report ran that he said to him, “Forget it.” What the evidence shows that he actually said is, “Do as I am going to do, deny it.” And when Peck, having some regard for his oath, said “I suppose I will be on oath,” the defendant said “That is nothing; forget it.”

On the 19th day of July, or soon thereafter, this defendant, the Governor of the State of New York, sitting in the chair that has been occupied by men of the highest character, and, praise God, that from the beginning has never been occupied by one suspected of personal dishonesty until William Sulzer came to it, the chair that within the time of my own official life and recollection was occupied by Levi P. Morton, a man who would no more do a dishonorable act than he would put his right arm in the fire and let it wither; the chair in which next sat the brilliant Frank S. Black, than whom no more knightly soul ever came to that high office; the chair that from the beginning has been made sacred by great names of great men, men who would have scorned a dishonorable thing as they would have shunned a wound; sitting in this chair, the defendant was guilty of the loathsome crime of subornation of perjury. It was left to this year one thousand nine hundred and thirteen, this year of wrath, to have in the executive chamber a Governor who could so far forget not only decency and official honor, but who so forgot the limitations not only of the moral but also of the criminal law, as to ask this great officer of the State, under him, to go on the stand and commit rank perjury to save his miserable self from the punishment that he deserved.

Did Peck tell the truth? Why, there is the easiest way in the world to raise an issue; the easiest way in the world, for, if Peck did not tell the truth, some witness can come here and testify that he did not. In all the attack on Peck the learned counsel forgot to have the testimony contradicted. I recall one time in the trial of an action how tremendous energies were bent to the impeachment of a witness who had testified to a fact, but the learned counsel who impeached so devoted their energies to that single fact that they forgot entirely to contradict the witness whom they

impeached. If Peck did not tell the truth here, no one knows better than the learned counsel who sit at the table of this defendant how to meet it and how to beat it, and they know, too, that it is not by vociferous denunciation of the witness, who was entirely uncontradicted, that they can convince that he told a lie. If at any time — I take the liberty of saying — if at any time Mr. Sulzer, this defendant, sees fit to join issue as to any question of fact with Mr. Peck, on the witness stand, in any county of the State, Mr. Peck will submit it to the following grand jury to say which one has committed perjury, he or this defendant. If there were no corroboration whatever, there is not a member of this Court that would have the slightest justification for disbelieving Peck; but when you add to Peck's testimony the fact that he is corroborated in the strongest degree by Morgenthau, whom they do not dare to contradict or claim is untruthful, by Morgenthau to whom he made a similar dishonorable request, you have the testimony of Peck utterly uncontradicted and utterly irrefragible.

There still remains to be considered the testimony of Mr. Ryan on this same point.

It stands here without contradiction of any kind. The defendant asked him to see Senator Root and have the members of this Court solicited to vote in his interest, and to dismiss these proceedings.

Can the learned Presiding Officer of this Court imagine, with all the experience that he has, what would become of the law if it was to be administered by a direction from one political chief, or another? Did this eminent lawyer — I know he must be eminent, because Exhibit 130 for identification says so, although I must say that the remarks of Senator Hinman on the opening somewhat shook my faith as to the eminence — did this eminent lawyer think that that is the way justice is administered in this State, and did he think that there was any member of this Court, the youngest and least in experience even, who would listen, who would so far forget his honor that he would listen for an instant to a suggestion from a political leader as to what should be done in court here, after he had lifted up his hand in the presence of his fellow members of the Court, and sworn to well and truly try this defendant upon the evidence?

Did this man believe, for a single instant, that anything that Ryan, or anyone else, could do, would help him in the decision of the legal questions arising on this trial?

Failing in having Ryan see Senator Root, then he wanted him to see Mr. Murphy, so as to touch the other political side of the house for the same purpose; and then the cringing, miserable craven that he was, he said he "would do whatever was right if it could be done!" "Whatever was right, if it could be done!"

God in Heaven! Can anyone deliberately stand in this or any court and defend a man who is guilty of that? That is the black evidence convicting this defendant under article 4, as to which my friends have carefully refrained from making any argument whatever. The relevancy of this evidence of Peck and Ryan and Morgenthau, aside from the fact that Morgenthau and Peck were solicited not to go there, which makes it directly relevant — but the relevancy, aside from that, is most clearly set out by Judge Vann, in the case of Nowack against the Metropolitan, in 166 New York.

"Evidence tending to show that a party to an action tried to bribe a witness to give false testimony in his favor, although collateral to the issues, is competent as an admission by acts and conduct that his case is weak and his evidence dishonest. It is somewhat like an attempt by a prisoner to escape before trial, or to prove a false alibi, or by a merchant to make way with his books of account, except that it goes farther than some of these instances, for in addition to reflecting on the case, it reflects upon the evidence upon that side of the controversy. Where it appears that on one side there has been forgery or fraud in some material parts of the evidence, and they are discovered to be the contrivance of a party to the proceeding, it affords a presumption against the whole evidence on that side of the question, and has the effect of gaining a more ready admission to the evidence of the other party. It is not conclusive even when believed by the jury, because a party may think he has a bad case, when in fact, he has a good one, but it tends to discredit his witnesses and to cast doubt upon his position."

So, we have it that, upon the testimony of these witnesses, article 4, which charges acts done by this defendant since he became Governor, which charges him with seeking to prevent the committee from getting evidence of certain witnesses named, and all other persons, that that article stands proven here, stands proven beyond question; and it removes from the consideration of the case all argument or doubt on this matter of impeachable offenses, or of offenses committed before the commencement of the term being impeachable.

Here was an act done while he was Governor. It was done at the very time that a legislative committee was seeking light for the purposes of legislation. The defendant deliberately sought to keep these men from going on the stand, from giving true testimony before the Frawley committee, and by so doing he is proved guilty of the crime set out in article 4.

And this is the Pharisee, who, pointing to the width of his Phylactery in proof of his own virtue, demanded that Stilwell resign — Stilwell, who, if all the charges against him were true, and more, could still have sat at the feet of this man and learned crime, even as Saul sat at the feet of Gamaliel and became learned in all the wisdom of the ancient Jews.

No elaboration is here needed, no argument, no comment. The thing urged by the defendant stands out in all its detestable lines. He urged Morgenthau to commit perjury, he urged Peck to commit perjury. He declared his own intention to do so; and he urged Ryan to tamper with this Court, to the end that he might be acquitted, irrespective of his innocence or his guilt.

The honored President of this High Court has passed something like thirty-three years on the bench — almost a half century as lawyer and judge together. I wish that he might tell us whether in all his career he has ever seen a more plainly proven, bald, naked violation of law than this; a more shameful attempt to prevent a party from procuring the testimony of witnesses; a more wicked violation of the moral law relating to the subject. It proves conclusively the truth of article 4. It removes any question as to the act being during the official term. It leaves the defendant here stripped naked of any defense at all.

And over it all croaks hoarse that blackest raven of all the

crimes connected with the administration of justice — subornation of perjury and the declared intention of the defendant himself to commit perjury. Is there anything further required to convict this defendant and remove him from his high place, and to disqualify him forever from association with law-abiding men?

Think of a Governor of the State of New York, against whom charges are made which, if true, render him infamous, who fails to take the stand and deny them. Either the charges are true beyond denial or his record is too hopelessly bad to stand a cross-examination. The very learned counsel here representing the defendant may take such of comfort as they find possible from either of these excusing alternatives.

What I have said with respect to article 4 is true, not so conclusively proven true, but still is proven true and fairly so by a fair preponderance of the evidence, as to article 3. That article charges the defendant with having sought to prevent Sarecky from going before the committee and testifying. And Sarecky did not testify. But, the defendant says, it is not proven that the defendant gave him, directly gave him, any advice not to appear before the committee. It is not proven? What is a deduction of fact on which we act every day in courts, and ask juries to find? Here was this man Sulzer babbling to every man he saw the hopelessly bad law of my brother Marshall's opinion and advising him not to go before the committee. He had told Fuller he wanted him to have Marshall for his attorney. He told Ryan that they could not make him appear before the committee. He told the same thing to Peck. Is it likely that, having thus cackled from one to another, whoever came to him, advising him not to go before the committee, is it likely that he did not also tell the boy, who sat at his side and had during many years? If he did, then he is proven guilty under article 3.

Note the succession of events as to how he rewarded Sarecky for not testifying. On the 21st of July Secretary Platt notified the Civil Service Commission that Sarecky had resigned the position of confidential stenographer as of the 18th of July. On the 23d, Hanify wrote to the Hospital Commission requesting a suspension of civil service rules for Sarecky. On the 30th of July, Hanify wrote to the Civil Service Commission requesting exemp-

tion of Sarecky from examination, and that Commission passed a resolution complying with the request. On July 30th Sarecky first appeared before the Frawley committee. On July 31st Birdseye, secretary of the Civil Service Commission, wrote Sulzer, giving a copy of the resolution and asking his approval, and on the same day Sulzer approved it. On the 12th day of August, Hanify notified the Civil Service Commission of Sarecky's appointment. Sarecky had been the confidential stenographer to Sulzer from the 15th day of March to July 18th. From the 15th of May to July 4th, he was out on the road with Hennessy. Then he went back to work in the executive chamber, and he remained so occupied until his appointment as lay deputy in the bureau of deportation on July 18th.

About the time the committee began its hearings, the latter part of June, Sarecky packed up a bundle of papers, and some time in July, brought them from Sulzer's office at 115 Broadway to the executive mansion.

Hanify was appointed secretary to the State Hospital Commission on the 10th of July, and shortly before that, and after the Frawley committee had begun its hearings, Sarecky saw Hanify about the position of lay deputy. He had been asking Sulzer about a better position, and suggested the lay deputy job.

This was in the latter part of May, and he saw Sulzer after he had been subpoenaed before the Frawley committee, although he could not say whether he told Sulzer of the subpoena, until shown his testimony before the Frawley committee that he had told the Governor.

That is the succession of events and that succession demonstrates that this man attempted to keep Sarecky from before the committee, and then, Sarecky having failed to testify, that he gave him his reward in the shape of a \$4,000 place.

It is fortunate for us that in the consideration of the whole case we are not met by serious questions of fact — that the judgment here rendered may never be attacked nor criticised as based on wrong conclusions as to facts.

It surely lightens the labor of both Court and counsel that a detailed analysis of the testimony in this long record, with a view of determining what is true and what is false, is unnecessary.

Every fact claimed on behalf of the managers stands before you undisputed and uncontradicted. There is practically — nay, more, there is actually — no disputed fact in all the case. The defence has chosen to rest upon legal questions in the case, with the single other claim that its chief witness has sworn himself a criminal.

Whatever of satisfaction may come to the learned counsel for the defence from the fact that Sarecky has testified that in the defendant's service he committed forgery, shall be theirs to the full. Whatever of satisfaction comes from the fact that such known forgery has stood not only unrebuked by the defendant to the present moment, but rewarded by a place in the public service and a salary from the public treasury, shall be ours. And it stands as one of the despotic facts in the case, throwing a powerful side-light upon the defendant's construction of public duty, that when this boy, after ten years of tutelage in his service, with calculated premeditation, with deliberate intention to deceive in his heart, signed in the defendant's name and uttered to the trust company the letter of authority dated "En route," by which he gave to himself the right to dispose of thousands of dollars given to the defendant for a specific purpose, and upon the faith of which the institution to which it was addressed dealt with him as one having authority, that when, to the defendant's knowledge, he had done this, he met and has ever since met with nothing but commendation and promotion at the defendant's hands, and is here put forth as the defendant's chief and practically sole witness, worthy of bearing the brunt of the defence by which he hopes to save himself from everlasting disgrace.

What is there in the testimony of this witness Sarecky favorable to the defendant, or unfavorable to the prosecution?

He swears that he made up this statement of expenses filed, but he swears too that the defendant never told him of any of the omitted contributions; of Crossman & Seilken's \$2,500, of Morgenthau's \$1,000, of Croker's \$2,000, of Ryan's \$10,000, and a score of others, more than \$25,000 in all; not one of these was whispered to the witness by the defendant, who had received them all.

If this be so, and the defendant may not challenge it, then the defendant knew beyond cavil, knew beyond cavil, that the boy to

whom he entrusted the making up of this statement, did not know, and could not know, of these thousands of dollars contributed to the defendant's campaign, because, aside from the givers, their secret was locked in his own breast alone.

Sarecky testified that he made up the statement as well as he could, but, too, that he destroyed every item of evidence in the defendant's office, daily memoranda, checks, check stubs, everything tending to corroborate his story. He testified in every way possible to assist this defendant and to take upon his own body the wrongdoing shown here, but he said that the defendant signed and swore to the statement of expenses filed with the Secretary of State without so much as a glance at, or a word about, its contents, and in so swearing he covered himself with infamy as with a garment.

Where are the twelve or fifteen books at Eagle street that would today enlighten this Court as to all but three or four of the contributions that were made to this man? We have shown you something like \$12,700 checks and \$27,000 of cash. Where are the books that would show the balance? If this is the green tree, what must be the dry? Why, members of the Court, do I need to ask you as men of experience that, if these managers have been able to wrest from unwilling witnesses who have given the testimony here, the evidence to the extent that is named, the evidence of contributions, the evidence of law-breaking to the amount that has been shown here, what would be shown if the defendant would but come on the stand himself, or would send over the books that would show the sums that were received? He made himself rich by these contributions, except as he made himself poor by his antics in Wall street.

Where is Colwell? The learned counsel says that the defendant offered to produce him here if he should be assured he would not be punished under a warrant outstanding for his contempt of Assembly. The Assembly consists of 150 members sitting on the other side of this building. Is there any one here who would have the effrontery to stand up in Court, and say, "I stand bound that, if Colwell comes into the State, he shall not be arrested upon a warrant now outstanding for him?" Oh! it is so easy to be brave when there is no danger, and our friends are

so willing to challenge the good faith of the prosecution in wanting Colwell, because they knew he was outside the State and we could not get him! Colwell, who knows all about the No. 500 account, telephoning to have his bag packed to meet the northbound train, saying he was going to Albany to see Sulzer; and from that date, so far as this State is concerned, he has vanished off the face of the earth. Do you need to be told that Colwell has been kept out of this jurisdiction of the Court by the advice and connivance of this defendant?

Why was this persistent wish to have cash contributions instead of checks, except that money has no ear-marks? It stands — recurring again to Sarecky's testimony — that if all that this young man has testified to on the stand be true, he assumes responsibility for failure to account for \$5,200. The unreported items that were deposited by him in the Mutual Alliance, the total deposits in there being something over \$12,000, show that he fails to account for \$5,200. And it leaves \$32,500 unreported and unaccounted for by anybody connected with the case.

I appreciate, members of the Court, that there are many details of the evidence into which I could go and upon which I could comment, in corroboration of our presentation of the case and of the evidence that we have produced here, but time fails.

In the absence of any contradiction, I decline to go further into the testimony, or to make any analysis of it. The evidence stands as true. No one accustomed to weighing testimony, no one familiar with the trial of cases or the sifting of evidence, can doubt for a single minute, no member of this Court has a single excuse for having any doubt as to the truth of the evidence that has been put in here by the managers of this prosecution. And so, leaving any further analysis, leaving the various points that have been discussed by my associate, with a wealth of learning and an earnestness that I can neither have, nor hope to have, the further consideration of the case is left to you, as men familiar with affairs, day by day, as men capable of making a correct decision of the case, and it is submitted without any possible doubt as to the result that must be reached.

Oh, members of the Court, an acquittal to this man upon this evidence would be a wretched gift indeed. Think of the position

in which he would be placed by such a verdict. Dead forever among honorable men; cut off already by the unanswered evidence in this record from ever again striking hands in friendship with those who devote their lives to lofty purposes. And yet, an outcast among men, compelled for a brief time to represent the honor and dignity of the Empire State, to meet in official contact those, the latchet of whose shoes he is unworthy to loose, by whom henceforth he is abhorred; charged by the Constitution to see that the laws which he himself has flagrantly violated are faithfully executed against others. Think of him, think of him — if your imagination can carry you to such lengths — solemnly considering an application for a pardon for one who had been convicted of a violation of the election law as to corrupt practices. Think of him as this fall issuing a proclamation asking the people to come together in thanksgiving for God's mercies to us. Think of him in all the multifarious situations requiring not only actual freedom from things criminal, but even from any suspicion thereof. Think of him "the same old Bill."

Knowing full well, appreciating to the utmost, the degradation and the disgrace that must come upon this unhappy man by your verdict of guilty, I still beg you not to think that you will mitigate his punishment by a judgment of acquittal of the charges here proven. It will not be your action that will render him infamous for all the future. That future is already his before you speak. If he take the wings of the morning and fly to the uttermost parts of the earth, the record of his disgrace is there before him, to meet and greet and abide with him. If he call upon the mountains and the rocks to fall upon and hide him, he will still know no respite from the disgrace that henceforth must walk by his side.

Do not believe that you can lessen his punishment, whatever your decision here. All that you can do is to pronounce, in form of law, in performance of your solemn duty, the judgment that will free the State from the contaminating touch of this man, from this time forth.

It is to you alone that the people can look for relief. Much has been said on the part of the defendant that he derives his title to his great office by election by the people and that you may not rightly set aside the choice. Let me remind you that the same

people who elected him Governor of the State have placed in your hands, not simply the authority but the mandate, if two-thirds of your number find him guilty of crime unfitting him for the exercise of the duties of his office, to remove him. And there rests no heavier duty upon this body than that of convicting, upon impeachment, any official proven guilty. Forced upon you by no act or wish of your own, the situation requires you to do justice and fear not.

The pen that writes the judgment of this Court will be mightier for the weal or for the woe of this State and for all the people thereof than any implement of war ever wielded by the arm of man — mightier to us awaiting its record — mightier to all the coming ages. If this last and best attempt at self-government, under which we have rested in security in all the century and a third of our national life, under which the State has been the leader of all the sisterhood that compose the Republic — if this shall fail at the point that we may not remove from high office men confessedly guilty of crime, then, indeed, are we of all men the most miserable. We can transmit our trust as guardians of the present, “as the heir of all the ages in the foremost files of time,” to no successor save the coming generation. If that generation come to its inheritance blinded by the example of corrupt officials unpunished and unrebuked, we are near the fall, as we well deserve to be.

You alone can deliver us from the body of this death, oh, wretched men that we are, you alone can deliver us from the body of this death.

And so we leave this case with all its vast interests, the interests of all who love the State and are jealous for its honor and good fame, in your hands; leave it with all that it means to the people and to the future. Words fail me in the contemplation of all that your decision means. If it ever pleases the Father of us all to guide with His own hand those engaged in the performance of a great public duty, may that guidance be yours this day, and may the decision here rendered bear sure impress that it comes from a wisdom that giveth judgment far above the twilight judgments of this world.

SUPREME COURT.—

THE MATTER OF THE HABEAS
CORPUS

for

JOSEPH G. ROBIN.

Memorandum on behalf of the Managers for the Assembly, submitted to the Supreme Court on the application of Joseph G. Robin, for discharge from custody because of a pardon issued to him by William Sulzer.

The manifest purpose of the pardon of Robin by Governor Sulzer, being to test before the court some of the questions involved in his impeachment by the Assembly, now pending in the Court of impeachment, the counsel for the Managers on such impeachment, with the permission of the court, file this brief memorandum, stating the position taken by them on the questions involved, without entering into any elaborate argument, they preferring to leave such argument until the impeachment trial, itself, is heard.

I.

It being the manifest, and we doubt not the avowed, purpose of Governor Sulzer, by this proceeding to secure a decision that may in some way affect, or embarrass, his trial in the Court of impeachment, it is suggested to the Special Term that it is well within its rights, and is in accord with the uniform practice of the courts, to decline to entertain the proceeding, or to make any decision therein.

The impeachment proceeding is pending, awaiting trial, and the court has been summoned for the 18th inst. It is the highest court in the State, the only one charged with the solemn duty of trying such officials. It has among its members the judges of the Court of Appeals. It is presided over, in the case of the impeachment of the Governor, by the Chief Judge of that court. It is unnecessary to describe its august character, or to mention the respect due to it. It is enough to say that it is the court of the constitution provided for the removal of unfaithful officers, and stands, as it has stood for more than one hundred and thirty years, as the one court charged with this high duty.

It is incongruous that any proceeding should be instituted, or attempt be made in a lower court — and every court in the State is a lower court — to secure a decision previous to the trial of the impeachment, that may in any way embarrass such trial. Such a decision cannot be binding any more than the decision of any court of original jurisdiction is binding on an Appellate Court expressly authorized to review such original decision. Whatever decision this court may give in this proceeding, in so far as it involves a construction of the power of the Court of Impeachment, cannot have the slightest binding force upon that high tribunal, when it meets. It is true that such decision will be entitled to a most respectful consideration as the decision of the Supreme Court, and that a decision by the very learned member of the court before whom the proceeding is brought, against the contention of the managers of the impeachment proceedings in any particular, would be scrutinized and challenged, if challenged at all, only from the standpoint of the greatest respect for the justice making it. But as to binding force — as to, in the remotest degree, controlling the decision of the Court of Impeachment on any subject,— it can have no greater or other effect than stated.

Under such circumstances it is submitted to the court — not urged, merely suggested, by the counsel for the managers.— because such counsel are ready to maintain the integrity of the impeachment proceedings whenever, and wherever deemed properly challenged — whether it is not the part of delicacy to decline to consider any questions thus involved in the impeachment proceedings, on the ground that such proceeding pending, as before stated, and coming on presently for trial, will result in an authoritative and decisive decision of all questions there involved.

Where an appeal is pending in the Court of Appeals that will settle authoritatively any question arising in a series of cases, one of which has been tried and is thus in that court, it is, I believe, the universal practice of the court to decline to proceed with the trial of the cases remaining untried, and to await the decision of such court, that will serve as a guide for the trial of the others. The situation here is analogous.

II.

The proceedings in the Court of Impeachment, and the steps previous thereto in the Assembly, cannot be attacked collaterally here.

William Sulzer, the Governor, stands impeached by the Assembly of the State. The journal of the Assembly shows that a resolution of impeachment was adopted, that articles of impeachment were adopted, that both the resolution and the articles were presented to the Senate, and the journal of the Senate shows the receipt of such articles, and the action taken thereon by the Senate. The return here made to the writ so sets out. It stands as a fact that may not be gainsayed. The impeachment is an accomplished fact, the proceedings necessary to a trial by impeachment have been begun. It is precisely as though an action had been begun and were pending in this court. It may be that when the trial comes the defendant will succeed — it may be that the complaint will be dismissed on some technicality — but, until that is done, the action is actually in the court, is actually pending. The impeachment by the Assembly actually exists and is forceful, and whatever rights are given, or denied, to any one by virtue of the fact that such proceeding is pending, cannot be attacked in any other action or proceeding. It may be that this court, sitting here, would decide that the articles of impeachment are insufficient, that they were not properly preferred at a special session of the legislature, that the defendant is not guilty, if such questions were here for determination, but all those questions must be tried in the court where pending and cannot be subjected to a collateral attack here.

An injunction issued by a court having jurisdiction, and having been duly served in an action pending, may the party enjoined be heard to say that he is going to succeed in the action and that therefore he will violate the terms of the injunction order?

The return here showing that articles of impeachment have been adopted by the Assembly, delivered to the President of the Senate and served upon William Sulzer, the Governor of the State, the counsel for the prisoner in custody will not be heard to claim that such impeachment proceedings are not actually pending, with all the consequent results flowing from such pendency.

III.

The exercise of the functions of the office of Governor by William Sulzer ceased on the adoption of the resolution of impeachment by the Assembly.

Article IV, section 6 of the Constitution provides as follows: "In case of the impeachment of the Governor * * * the powers and duties of the office shall devolve upon the Lieutenant-Governor for the residue of the term, or until the disability shall cease."

When then is an official impeached — when the Assembly passes its resolution of impeachment, or when the Court of Impeachment convicts, on the articles so preferred by the Assembly?

Article VI, section 13, provides "The Assembly shall have the power of impeachment by a vote of a majority of all the members elected." Having the power of impeachment, the Assembly exercises that power by passing the resolution of impeachment; and from that moment the accused official stands impeached.

The definition of the word "impeachment" can lead to no other conclusion.

The Century dictionary gives this: * * *

"2. A calling in question; accusation of wrong or error" * * *

"3. A calling to account; arraignment; the act of charging with a crime or misdemeanor; specifically, the exhibition of charges of maladministration against a high public officer, before a competent tribunal."

What an indictment is, in the prosecution of an ordinary crime, impeachment is against a high public official. It is the accusation. It charges the accused with a specified crime. Every school boy remembers Burke's speech, on the trial of Warren Hastings before the House of Lords. "I impeach him of high crimes and misdemeanors." He did not mean that he convicted him, for Hastings was finally acquitted. He meant that he accused Hastings and asked the Court of Impeachment to convict on the Articles of Impeachment.

In his life of Chief Justice Kenyon, Lord Campbell, himself Lord Chief Justice and Lord High Chancellor of England, as a

History, referring to Hastings: "At the instance of some of the Whigs, at the head of whom was Burke, he was impeached by the House of Commons." But the House of Commons could not convict — it could only accuse.

Article II, sec. 4 of the Federal Constitution, recognizes this argument and the distinction between impeachment and conviction, where it provides that certain officers shall be removed from office on "impeachment for, and conviction of," etc.

The Supreme Court in *Kilbourn v. Thompson*, 103 U. S. 168, 190, does the same: "The House of Representatives has the sole right to impeach officers of the government and the Senate to try them." See, too, to the same effect *id.* p. 191.

There would be little question on this point, even if nothing further were said on the subject, but the Code of Criminal Procedure recognizes the same thing and provides specifically that "No officer shall exercise his office after articles of impeachment against him shall have been delivered to the Senate, until he is acquitted." (Sec. 129.)

The Code, from which quotation is thus made, cannot of course alter or change the effect of the Constitution. It is, at least, doubtful whether cessation of the functions of the office by the accused does not occur the moment that the resolution of impeachment is adopted, but, certainly, under the provision of the Constitution and the section of the Code quoted, it ceases when the articles are delivered to the president of the Senate. It might be very interesting to reason on the question as to whether, intermediate the time of the adoption of the resolution by the Assembly and the delivery of the Articles of Impeachment, the Governor against whom proceedings were being taken could exercise any function of his office, but the question is not likely to arise in any phase of the *Sulzer* case.

The contra contention is that "impeachment," as used in Article IV, section 6, "In case of the impeachment of the Governor * * * the powers and duties of the office shall devolve upon the Lieutenant-Governor for the residue of the term, or until the disability shall cease," means conviction; that it is only after trial and upon conviction that the functions of an impeached Governor devolve upon the Lieutenant.

This claim ignores the plain reading of the Article.

We have seen that in case of impeachment, by Article VI, section 6, the powers and duties devolve, etc. By section 13 of the same Article the Assembly is alone given the power of impeachment.

It stands, then, that what causes the power and duties to devolve is something that the Assembly does and has power to do. The word "impeachment" is not used twice in the same Article with different meanings; it means the same thing in both places and of course. The Assembly cannot convict. It has no part in the trial; all that it can do is to accuse, to impeach. It is that act done by the Assembly, the impeachment, that suspends the powers. Conviction can only be had in the Court of Impeachment, composed of members of the Court of Appeals and of the Senate, which cannot impeach at all, can only try and, either acquit, or convict.

And this demonstrates beyond all cavil that the claim that an impeached Governor may continue to exercise the functions of his office until the conclusion of the trial, is hopelessly wrong.

It follows that the exercise of the functions of the office of Governor ceases (I believe upon the adoption of the resolution of impeachment by the Assembly, but certainly) upon the delivery of the articles of impeachment to the president of the Senate, and, of necessity, that Mr. Sulzer had no power to issue a pardon to the relator.

The writ should, therefore, be dismissed.

Saratoga Springs, N. Y., September 8, 1913.

